IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-936

COASTAL STATES PETROCHEMICAL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

JOHN J. REED
1744 R Street, N.W.
Washington, D.C. 20009
Attorney for Petitioner

Geoffrey Creyke, Jr.
Hudson, Creyke, Koehler and Tacke
Of Counsel

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INDEX

CITATIONS

Cases

Statutes

Regulations

Court Rules

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Petitioner respectfully requests that a writ of certiorari be issued to review the judgement and opinion of the United States Court of Claims in this case (No. 190-72) which was entered on July 8, 1977.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, pp. 1a to 39a) will be reported in 214 Ct. Cl. 520, 559 F.2d 1 (1977). The order of the Court of Claims denying petitioner's motion for rehearing *en banc* (App. B, *infra*, p. 1b) is unreported. The opinion and findings of fact of the Trial Judge of that court (App. C, *infra*, pp. 1c-44c) are unreported.

JURISDICTION

The opinion of the Court of Claims was entered on July 8, 1977. A timely petition for rehearing *en banc* was denied on September 30, 1977, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims committed gross error compelling reversal when it held:

   (a) That a Government six-month jet fuel supply contract was an Indefinite Quantities contract imposing a maximum obligation of one hundred dollars upon the Government while exposing Petitioner to a potential obligation of nineteen million dollars; and
   (b) That such an interpretation of the contract was reasonable, in spite of governing regulations and the legitimate expectations and intent of the parties.

2. Whether the Court of Claims committed gross error compelling reversal when it held:

   (a) That the Petitioner and other domestic suppliers had no basis to believe that cutbacks in contractual obligations would be implemented by the Government in an equitable fashion and consistent with the restrictions that the Government had placed upon the original contracting process; and
   (b) That this interpretation was reasonable, in spite of the expectations of the parties and the Government's special obligation of fairness.

3. Whether this judgement should be reversed and the cause remanded for a new decision because the Court of Claims, acting contrary to Judicial practice and procedure:

   (a) Disregarded its own Rule 147(b) and ignored the presumptively correct Findings of Fact of its Trial Judge without explanation and supplementary findings of its own; and
   (b) Rejected undisputed facts stipulated to by the parties.

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

1. Armed Service Procurement Regulation (ASPR) 3-409.3 (32 C.F.R. §3-409.3 (1975))

Indefinite Quantity Contracts

(a) Description. This type of contract provides for the furnishing of an indefinite quantity, within stated limits, of specific supplies or services, during a specified contract period, with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. The contract shall provide that during the contract period the Government shall order a stated minimum quantity of the supplies or services and that the contractor shall furnish such stated minimum and, if and as ordered, any additional quantities not exceeding a stated maximum which should be as realistic as possible. The maximum may be obtained from the records of previous requirements and consumption, or by other means. To assure that the contract is binding, the minimum must be more than a nominal quantity***

(b) Applicability . . . The indefinite quantities contract should be used only when the item or service is commercial or modified commercial in type and when a recurring need is anticipated.

2. Clause IE9, Balance of Payments Restrictions (DFSC May 1968)

(a) The following items being purchased hereunder are in implementation of the Balance of Payments Program. Only products which have been refined in the United States will be considered under this solicitation for such items.

* * * * *

(c) Balance of Payments Restrictions are applicable to items: 197, 198, 199A, 199B, 199C, 199D, 199E, 199F, 199G and 365.

3. Clause IE1, Import Quota (DFSC September 1968)

The Department of Defense does not presently intend to utilize any of its "finished products" import quota for purchases under this solicitation.

4. Clause 1VB1a, Scope of Contract Clause (DFSC June 1968) Contract No. DSA 600-69-D-2007)

(a) The Contractor shall furnish and deliver*** the supplies and perform the services set forth in the Contract Schedule, for the prices payable according to the terms thereof, in such quantities as may be ordered by the Ordering Officer during the period specified in the Schedule; in consideration therefor, the Government shall order, accept and pay for, on the terms and subject to the conditions set forth herein, supplies or services having an aggregate value at the prices payable under this contract of not less than $100.00: PROVIDED, however, that the Government shall be entitled to order, and the Contractor shall be required to furnish if ordered, supplies or services equivalent to but not in excess of the quantity designated by the Schedule for each item***.

STATEMENT OF THE CASE

The contract under dispute in this case involved the Department of Defense's program to procure large amounts of jet aviation fuel for use by United States military units and selected civilian agencies worldwide during the last six months of 1969. The difficulties that arose during contract performance time illustrate the serious and often inequitable disruption of Government procurement patterns that resulted as combat activities in Southeast Asia ebbed and flowed.

The Department of Defense began by establishing certain restrictions that governed the availability and sources of fuel to be provided by the domestic suppliers with whom it contracted. These prohibitions served as a policy vehicle to preserve a favorable United States balance of payments. Yet when a reduction in fuel requirements became certain, the Government chose to ignore the very prohibitions it had imposed. In thus implementing a cutback based solely on price, the Government penalized the domestic suppliers whose higher prices necessarily reflected the Government restrictions. It is this arbitrary action that Petitioner contends constituted a breach of contract, contrary to the holding of the Court of Claims.

1. *Background* - The Defense Fuel Supply Center (DFSC), Defense Supply Agency, Department of Defense (DOD) is responsible for procuring aviation fuel for U.S. military units and certain civilian agencies. Among the fuels that DFSC procures is JP-4, which is a volatile aviation fuel used exclusively by the military. Typically, DFSC procures JP-4 semi-annually in large quantities incapable of supply from a single source. Therefore, DFSC usually sends its In-

vitation For Bids (IFB) to more than 150 potential suppliers. Multiple awards of 60-80 contracts frequently result in order to secure the requisite volume of fuel.

Prior to 1967, DFSC procured JP-4 for use in the United States from domestic suppliers and refiners. DFSC supplemented the supplies of domestic fuel by using its Import Quota, which was an allocation granted by the Department of the Interior to DOD, as an historical importer, to import a fixed quantity of foreign finish petroleum products into the United States. DFSC usually used its quota to import JP-4 from Caribbean refineries. The JP-4 prices of United States suppliers traditionally have been higher than those of any foreign refiners; and such was the situation at the time instant here.

To satisfy the pre-1967 overseas JP-4 needs of U.S. military forces, DFSC negotiated supply contracts with foreign refiners located outside the United States. The fuel requirements of U.S. forces in Europe and Asia thus were met by foreign refiners using foreign products.

The conflict in Viet Nam drastically altered these traditional procurement patterns. As the war escalated, tremendous demands were placed upon a limited worldwide supply of JP-4. DFSC had to guarantee that enormous amounts of fuel would be available to U.S. forces in Europe and in Southeast Asia. Thus, DFSC began to re-route for shipment overseas foreign fuel previously shipped to the United States under the Import Quota system. Use of the DOD Import Quota was suspended late in 1967. Moreover, DFSC determined that to satisfy this increased demand it would be necessary to include in solicitations for domestic consumption specific quantities that then would be diverted for use overseas. These quantities however, were specifically "restricted to U.S. refined product" in order to avoid further erosion of the U.S. balance of payments posture.

The solicitation involved in this case reflected this altered pattern of procurement. On February 5, 1969, the United States issued a bid solicitation (herein the "IFB") to 168 firms for the purchase of projected JP-4 needs during the six month period from July 1, 1969 through December 31, 1969. DFSC issued this IFB under its program to procure JP-4 supplies for use *within* the United States. However, because of the disruption of normal distribution patterns occasioned by the war in Viet Nam, substantial quantities of the JP-4 under this solicitation were intended for ultimate use overseas. The IFB estimated JP-4 needs of 2,691,091,500 gallons, to be delivered to specified military destinations throughout the United States and to certain bases in Europe and the Pacific. The IFB estimated the "offshore" (non-U.S.) activities would require 371,960,000 gallons. The IFB included an itemized schedule which numbered and grouped the more than 300 military and civilian activities covered by the solicitation into four geographical areas (East Coast, Gulf Coast, Inland, and West Coast). This schedule estimated the fuel needs that were anticipated for each item-numbered activity (e.g., Bid Item 197 was Allbrook AFB, Panama, with an estimated gallonage for the six month period of 3,780,000).

Bidders were allowed to bid on any or all of the fuel needs in the solicitation, and, with one exception, could submit offers on either an origin or destination basis. The Government expressed a preference, however, for bids on an origin basis. As to Item 365, (the above mentioned exception), "West Coast Off-Shore", the solicitation indicated that only offers on an origin basis would be acceptable because the destination of the 189 million gallons of fuel involved, described only as various Pacific bases, was impossible to predict.

Bidders were allowed to bid on any or all of the fuel needs in the soliciation, and, with one exception, could submit of-

Consistent with the Government's policy in maintaining a favorable balance of payments, the solicitation was designed to limit the fuel provided under the contract to domestic source supplies. To achieve this purpose, DFSC included a Balance of Payments restriction clause which mandated that only products refined in the United States were to be considered for export under the offshore item requirements. The contract also included an Import Quota clause indicating that DOD did not intend to use its Import Quota for any purchases under the subject solicitation. That provision meant that a bidder who intended to supply any of the domestic needs (those items not subject to the Balance of Payments restriction) would be unable to supplement its supplies with products brought in under the DOD's Import Quota. The practical effect of these two clauses was to restrict domestic suppliers to use of domestically refined fuels in satisfying their contractual obligations. That was the understanding of Petitioner and that was the basis upon which it formulated its bid. The resulting bid price figures inevitably reflected the traditionally higher prices of domestically refined fuel.

The offshore portion of the IFB, 371,960,000 gallons, represented only a small fraction of DOD's total projected overseas needs for the second half of 1969. Therefore, DOD issued five other solicitations (herein "offshore" IFBs) in February and March of 1969 to satisfy its anticipated additional overseas requirements. Unlike the domestic solicitation to which Petitioner responded, these five solicitations were not subject to any Balance of Payment or Import Quota restrictions; the fuel to be supplied was clearly to be foreign refined products. As a result of these solicitations, contracts for nearly 1.4 billion gallons of JP-4 to be used in Asia, Europe, and Africa were awarded to 31 foreign suppliers. The foreign refiners were able to underbid domestic refiners who were subject to Balance of Payment restrictions.[1]

Petitioner was awarded a contract under the original IFB on May 28, 1969. Under this contract, Petitioner was to supply 182,516,000 gallons of JP-4 for a total contract price of $19,017,842.40. Approximately 151 million gallons of this amount was for overseas locations; the remainder was to be delivered domestically. Petitioner was obligated to deliver an estimated average 30 million gallons of JP-4 per month for a six month period, subject to a "final order" provision giving DOD the option of adding to the original obligation upon placement of a final order for any item on the schedule. The contract also contained a Scope of Contract clause:

> (a) The Contractor shall furnish and deliver*** the supplies and perform the services set forth in the Contract Schedule, for the prices payable according to the terms thereof, in such quantities as may be ordered by the Ordering Officer during the ordering period specified in the Schedule; in consideration therefor, the Government shall order, accept and pay for, on the terms and subject to the conditions set forth herein, supplies or services having an aggregate value at the prices payable under this contract of not less than $100.00***.

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[1] While most, if not all of the overseas points of use specified in the offshore IFB differed from the overseas delivery points specified in the IFB, the offshore IFB and the IFB *may* have overlapped, to a minor degree, since Item 365 dealt with the needs of "various Pacific bases" and the offshore IFBs dealt with Japan, Korea, and Taiwan. (Trial Judge Opinion 9-10, App. 8c).

Shortly after these various contracts became effective, DFSC was notified that world-wide usage of JP-4 was going to be lower than original estimates, reflecting the Presidential decision regarding curtailment of combat activities in North Viet Nam. Consequently, on July 30, 1969, DFSC notified all U.S. suppliers, including Petitioner, that there would be a reduction in JP-4 liftings during the six month period ending December 31 and that DFSC would advise as to specific contract reductions as quickly as possible.

DFSC realized that it had contracted for approximately 399 million gallons that were in excess of the reduced needs. It decided to achieve the necessary cutbacks by reducing its orders on a reverse least cost basis. It is this decision as to implementation that constitutes the basis for Petitioner's breach of contract claim.

DFSC implemented the reduction world-wide, attempting to achieve the largest practical monetary savings. DFSC re-evaluated all of its existing contracts, foreign and domestic, on the basis of the original agreed upon prices. Re-allocation was then made solely on the basis of these prices, in spite of the fact that the original contracts had been let on the basis of separate prices bid under separate procurements that were subject to radically different conditions. These conditions affected prices, and suppliers that were subject to them operated at considerable economic disadvantage; specifically, foreign oil, at that time, was significantly cheaper than domestic oil.

Under the terms of this re-evaluation, domestic suppliers such as Petitioner were afforded no special concessions to counteract the impact of the original contract conditions which dictated delivery by domestic suppliers in accordance

with Balance of Payment and Import Quota restrictions. These suppliers were at an unavoidable competitive price disadvantage. Re-evaluation based on price alone meant that overseas requirements which originally were to be satisfied with domestically refined JP-4 would now instead be satisfied with the lower priced foreign refined product. Moreover, DOD also decided to begin reutilizing its Import Quota to fulfill domestic fuel needs, meaning that these requirements would also be partially met by foreign products.

DFSC announced the inevitable cutback to Petitioner in a letter of August 29, 1969. That letter reduced Petitioner's contractual obligations from 182,516,000 gallons to 78,728,950 gallons. This amount represented a 57% reduction in the initial award and 26% of the total world-wide cutback in all contracts. This total reduction, which eventually reached 396,744,612 gallons, did not affect any foreign suppliers whatsoever. Its impact was confined to 15 U.S. suppliers, with Petitioner absorbing the greatest share of the overall cut-back. Moreover, Petitioner's share was greater than any actual reduction that may have occurred at the locations or points of use that had originally been indicated in the bid items that were awarded to Petitioner. As a consequence of the cutback, Petitioner was left with an excessive supply of components for refining JP-4 during the remaining months of the contract period.

2. *Proceedings in the Court of Claims*—Petitioner sought to recover for its financial losses that were attributable to the unanticipated cutback by proceedings in the United States Court of Claims. Jurisdiction was conferred on that Court by 28 USC §1491. The parties agreed that initially the issues would be confined to liability alone. The parties also agreed to a lengthy stipulation of facts. Trial was then held before a Trial Judge of the Court of Claims.

In the Trial Division, Petitioner argued that its contract was a requirements contract and that DOD's subsequent cutback in excess of its actual reduction-in-need constituted a breach. Petitioner also contended that the Government breached its implied obligation to act in good faith when ordering under the agreement. The Government, however, responded that the original agreement was merely an indefinite quantities contract, obligating DFSC to purchase only $100 of fuel under the Scope of Contract clause. Moreover, the Government argued that when its estimated needs did not materialize, petitioner was simply supplanted by lower priced domestic suppliers.

Trial Judge Wood of the Court of Claims did not accept Petitioner's contention that it had a requirements contract, mandating that DOD purchase from Coastal States its requirements for JP-4 that existed during the performance period at the locations identified by the contract. The Trial Judge, however, also rejected the Government's contention that its obligations under the contract extended merely to the purchase of $100 worth of JP-4. The Trial Judge dismissed the $100 minimum commitment language as standard boilerplate. Further, the Trial Judge held that the contract gave to Coastal States a right to compete *with other domestic suppliers* awarded contracts pursuant to the original IFB. Under this theory, Coastal States would not recover for disproportionate reductions to the extent that the requirements were instead satisfied by other domestic suppliers who had simply bid lower prices while operating under the same restrictions. However, to the extent DOD implemented the cutback by relying on price alone and then forcing Petitioner and other domestic suppliers to compete directly with foreign suppliers, who were unencumbered by balance of payment restrictions, a breach of contract did result. The Trial Judge's ruling meant that the cutback was to be implemented equitably, so as to insure that a supplier's prices were compared only with those of other suppliers operating under the same restrictions. The

Trial Judge reserved the determination of the amount of any recovery for further proceedings.

The Government filed an exception to the Trial Judge's Findings of Fact and Opinion. Petitioner, in contrast, modified its earlier position and requested that the Court of Claims adopt in full the Opinion, Findings of Fact, and Conclusion of Law rendered by its Trial Judge. It did so because the Trial Judge's Opinion appeared to be a fair resolution of a sticky problem. The Court of Claims, upon appeal, in a 2 to 1 decision, found for the Government, rejecting the Trial Judge's intermediate position, and instead narrowly insisted upon characterizing the contract as either an indefinite or requirements agreement. The Court majority, over the dissent, held that the original agreement was an indefinite quantity, open ended contract, obligating the Government only to purchase $100 of fuel from Petitioner. The Court held that the Government acted in good faith and met all obligations which it owed Petitioner under the contract.

In reaching its judgment, the Court claimed to have modified the Trial Judge's findings of fact as necessary to accord with its decision. The Court, in effect, repudiated certain of the Trial Judge's findings even though they are presumptively correct by the Court's own Rule 147(b). The Court then failed to make separate, corresponding findings of its own. Moreover, it blatantly ignored or rejected certain stipulated facts, crucial to the Trial Judge's opinion, as to which the parties were not even in dispute.

Judge Nichols dissented. He would have adopted the Opinion of the Trial Judge which he characterized as an able and fair handling of a novel and sticky situation. Judge Nichols criticized the majority for "the narrow literalism of the decision" and warned of its potential impact on the Government procurement process by its imposition of a burdensome obligation on contractors to include in their bids unrealistic allowances for unforeseen contingencies.

The Court denied Petitioner's motion for re-hearing *en banc* on September 30, 1977.

REASONS FOR GRANTING THE WRIT

Introduction

The decision in this case by the Court of Claims affects not only the parties and industries subjectively involved here, but the entire Federal supply procurement system, a multi-billion dollar per annum industry.

"Let right be done" has been the guiding watch word of the Court of Claims since its founding in 1855, but the Court's action demonstrated by this case, leads toward a technical legalistic approach which may have a negative impact upon the public confidence in the Government's essential fairness[2] towards those dealing with it. Since the decision of this Court in *United States* v. *Standard Rice*, 323 U.S. 106 (1944), the mutuality of obligation between the Government and those with whom it does business has been a cornerstone of federal procurement law. Yet here the contracting agency, and now the Court, has said that the Government is free to ignore its contractual obligations. Specifically the Court in this ruling has erred by contravening the Trial Judge's findings, the stipulated facts, and its own rules. It has, in effect, condoned a breach of contract on the part of the Government to the great financial detriment of Petitioner and, from a broader standpoint, has not provided the responsiveness of the Court of Claims as the conscience of the Government. That this Court should review this matter was perhaps best reasoned when it stated:

[2] See Remarks at Centennial Banquet of the Court of Claims and Concluding Statement of the Chief Justice of the United States, 132 Ct. Cl. 1, 27 (1955): "As long as one Government will continue to come into court on the same level as the most humble citizen, this Government is not in jeopardy".

> Contracts with the United States—like patents —are matters concerning far more than the interest of the adverse parties; they entail the public interest. *S & E Contractors v. United States*, 406 U.S. 1, 15 (1972).

1. The Court of Claims Erred by a Strict Literal Interpretation of one Contract Clause to the Exclusion of Other Clauses and Surrounding Circumstances.

Petitioner seeks the Court's review of the decision rendered by the Court of Claims not only for the purpose of redressing its grievance, but also for the broader, more important reason to have this Court direct its attention to an instance of an overly literal contractual interpretation by the Court of Claims.

The Court of Claims in this case has strayed from its historical role of being the forum to fairly address the grievances of the citizen against his Government; an advantage not available under most Governments in the World today, and an advantage which distinguishes our form of Government from others.

This Court should review the instant case and provide a beacon to the Court of Claims to arrest any tendency toward strict literalism.

That literalism was the hallmark of this case is probably best stated in the dissent of Judge Nichols. He said:

> The narrow literalism of the decision, and its insensitive insistence on deciding whether the contract was for an indefinite quantity or for requirements as established and mutually exclusive categories, will no doubt cause bidders to scrutinize IFB small print with more care, and insist that what they see as implied should be made express. Also, like so much else in Government contract law it says, in every bid you make,

scrutinize your cost allowance for unforeseen contingencies. It is probably far too low. 559 F.2d at 12, App __.

The Court erred by finding that the Scope of Contract Clause was supreme and determined the rights and obligations of the parties to the total exclusion of all other contract provisions and of the circumstances of the situation.

Under this conclusion, the Court determined that the contract between the parties must be an Indefinite Quantity Contract because of the Defense Department's need for flexibility and because of other ordinary operational conditions. (Both the Dissenter and the Trial Judge concluded that viewing the contract as a whole, the Scope of Contract Clause limitation of a $100 maximum liability to the government was mere boilerplate.)[3]

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[3] *Scope of Contract (DFSC 1968 June)*
IVBla ***

(a) The Contractor shall furnish and deliver*** the supplies and perform the services set forth in the Contract Schedule, for the prices payable according to the terms thereof, in such quantities as may be ordered by the Ordering Officer during the period specified in the Schedule; in consideration therefor, the Government shall order, accept and pay for, on the terms and subject to the conditions set forth herein, supplies or services having an aggregate value at the prices payable under this contract of not less than $100.00: PROVIDED, however, that the Government shall be entitled to order, and the Contractor shall be required to furnish if ordered, supplies or services equivalent to but not in excess of the quantity designated by the Schedule for each item***.

The parties interpretation of the meaning of this Clause was set out in the Trial as follows:

Petitioner witness, Juren stated:

The opinion sets forth the pertinent Armed Services Procurement Regulations (ASPR §3-409.3,32 CFR §3-

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Answer: ***I construed the purpose of it [meaning the minimum obligation clause of the contract], as being precisely what I'd defined before. And that is, that if one of the installations which we are supplying were to go out of business, so to speak, or to be closed by directive or otherwise, then the contractor or the government should obviously have no liability to take fuel for that closed installation, and at great expense to them, divert it someplace else.

So, my understanding of it was that the provided the government with the necessary escape—if you would call it that—in the event an installation requirement ceased to exist.

Question: So, you relate the meaning of that clause to a diminution in government need. Is that correct?

Answer: Yes.
[Transcript at 54]

Later, during redirect, the same point was made again.

Question: So, you do relate that clause [meaning the minimum obligation clause] to a diminution in need, on the part of the government, rather than simply the right not to take, under any circumstances?

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Answer: By diminution of need, if you meant that—at any time, during the course of the contract, that I was delivering product to Base A, that if the government suddently had the opportunity to secure a lower-priced fuel and cut me off, and substitute this lower-price fuel. The answer is "no". [Transcript at 68]

Upon cross-examination, Government witness Drescher stated the following:

Question: I take it then, your view of the $100 clause coincides 100 percent with that of Mr. Juren's, who testified this

409.3 (1975)) clause defining Indefinite Quantity Contracts, but only in part. 559 F.2d, n.11 at 6, App 11a. However, it ignored language in that same ASPR provision which was favorable to plaintiff's view of the case. Specifically, it ignored that part of the clause which states:

> To assure that the contract is binding, the minimum must be more than a nominal quantity; . . . (ASPR §3-409.3(a), 32 CFR §3-409.3(a) (1975).

Further, ASPR §3-409.3(b), 32 CFR §3-409.3(b) (1975) states in part:

> The indefinite quantity contract should be used only when the item or service is commercial or modified commercial in type . . .

The facts in this case show that the minimum obligation of the Government of one hundred dollars compared to the obligation of the petitioner for in excess of nineteen million dollars worth of fuel can only lead to the conclusion that the stated minimum was a mere nominal quantity and did not comply with the Government's own regulations; therefore, this contract could not be construed to be an Indefinite Quantities Contract.

Also, the parties by stipulation before Trial agreed that JP-4 fuel was exclusively a military product and had no commercial application.[4] Again, the contract was not in

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> morning, that this clause is directed to a situation where the military's requirements for fuel are reduced, for one reason or another?
>
> Answer: That's correct.
> [Transcript at 137, 138]

[4] Trial Judge's Finding of Fact No. 2, App 23c.

compliance with the applicable regulation setting forth the requirements for an Indefinite Quantities Contract.

Clearly, this strict literal interpretation of a single clause of the Contract could only result in a gross lack of mutuality between the contracting parties; such could not have been the parties intent.

Previously, the Court of Claims encountered this same dilemma, but, with a sense of fairness, put such "boiler-plate" contract language in the proper perspective. Perhaps the best expression of the Court of Claims' prior position that a contract should not be interpreted to impose a totally one-sided bargain was *Albano Cleaners, Inc.* v. *United States*, 197 Ct. Cl. 450, 455 F.2d 556 (1972).

In *Albano, supra*, the Court stated:

> Whatever the permissable scope of such an indefinite quantities provision is (see, e.g., *The Tennessee Soap Co.* v. *United States*, 130 Ct. Cl. 154, 126 F. Supp. 439 (1954)), such an unusual and unfair interpretation of the clause here involved as defendant proposes could hardly have been in accord with "the rational intention of the parties" when they entered into this contract, *Ozark Dam Constructors* v. *United States*, 130 Ct. Cl. 354, 360, 127 F. Supp. 187, 191 (1955), and the court would not be justified in adopting it. 197 Ct. Cl. at 459, 455 F.2d at 561.

For the Court of Claims to find that the parties intended to accept such a wide range of contractual obligations ($100 versus $19,000,000) is an absurdity. The parties could not have had this disparity in mind. No rational business person would make such a one-sided bargain; the risks assumed would be disastrous if events led to the literal invocation of such Contract language.

Government procurement, now a multi-billion dollar annual business, should never be allowed to become a one-

way street for either party. The Court of Claims itself recognize the complexities of the Government procurement process when it stated that in reaching its conclusions it was necessary and appropriate to:

> . . . . look both to the written terms and to the surrounding circumstances, availing ourselves "of the same light which the parties possessed when the contract was made". *Franklin Co.* v. *United States*, 180 Ct. Cl. 666,669, 381 F.2d 416, 418 (1967).

In the instant case, Petitioner submits, the Court of Claims failed to exercise its proper function, and, without reason, abandoned its prior guidance in contract interpretation. It is this strict literalism, which could only lead to a gross inequity, that this Court should recognize in this case and require the Court of Claims to revert to its broader interpretive role with regard to Petitioner's contract.

2. **The Court of Claims Erroneously Interpreted the Impact of the Balance of Payments Restrictions Clause and the Import Quota Clause Upon All Domestic Bidders, Including Petitioner**

The Supreme Court should review this case to annunciate a standard of fairness which the Federal Government must exercise as a contracting party in its dealings with its contractor-suppliers.

The Supreme Court should use this case to exercise its Judicial function of providing to the Executive Branch the benchmark against which the contractual role of the Federal Government must be measured as to a standard of fairness. The Federal Government has a special obligation to deal fairly with all its citizens in every facet of its governmental role, including contracting. This doctrine has been

established in the decisions of many Courts, including the Supreme Court. In *S&E Contractors* v. *United States*, *supra*, at 10 this Court held:

> A citizen has the right to expect fair dealing from his government, see *Vitarelli* v. *Seaton*, 359 U.S. 535, 3 L. Ed. 2d 1012, 79 S. Ct. 968.

Also, the Court of Claims has expressed itself on this point as follows:

> Unless all considerations of equity and justice are disregarded and contracts of this type turned into pure gambling transactions with the odds always in favor of the Government, we believe a high degree of good faith should be required on the part of the Government and its agents. *Gemsco, Inc.* v. *United States*, 115 Ct. Cl. 209, 230 (1950).

Here, restrictive clauses were placed in the Bids and the resulting Contracts which materially affected the prices offered by the bidders. Then during the performance time period of the contract, the Government changed its position and completely ignored the restrictions which it had established at the outset, which action caused results detrimental to many of the contractors, including Petitioner. Such conduct can not be justified and creates a harsh and inequitable impact upon those who were forced to comply with the stated restrictions.

The Court's decision reviewed the pertinent restrictions (Clauses 1E1 and 1E9)[5], but rationalized that Petitioner

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[5] 1E1 IMPORT QUOTA (DFSC 68 SEP)

The Department of Defense does not presently intend to utilize any of its "finished products" import quota for purchases under this solicitation.

had no basis to rely upon them, in effect dismissing the impact that these restrictions had. We submit that was error when the contract is viewed in its entirety, and that it is another illustration of the overly literal interpretation by the Court of Claims.

Conversely, the Trial Judge considered the impact of these Contract Clauses with great care to determine how they impacted upon the Petitioner. (Trial Judge's Opinion 36, App 32c-33c). He concluded that Petitioner's reliance was reasonable and supported by the evidence.

As to the cutback procedures, the Government stipulated and agreed that:

> Within the framework of this approach, U.S. suppliers such as Coastal States were accorded no economic concession for the fact that they were contractually obligated to deliver, in accordance with the contract's balance of payments restrictions (and also because of foreign product import restrictions), fuel that had been domestically refined and which, by definition, was higher priced than foreign-refined fuels

and

> This competitive re-evaluation and reallocation of remaining fuel demands was carried out not-

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IE9 BALANCE OF PAYMENTS RESTRICTIONS
(DFSC May 1968)

(a) The following items being purchased hereunder are in implementation of the Balance of Payments Program. Only products which have been refined in the United States will be considered under this solicitation for such items.

* * * * * * * *

(c) Balance of Payments Restrictions are applicable to items: 197, 198, 199A, 199B, 199C, 199D, 199E, 199F, 199G and 365.

> withstanding the balance of payments and import quota restrictions that originally applied in the JP-4 contract that had been awarded to Coastal States. (Stipulation of Material Facts 33, 34; Trial Judge Findings of Fact 19d, 21a, App 42c-43c).

How these actions impacted upon plaintiff and the harsh, inequitable result is perhaps best stated by Judge Nichols in his dissent.

> Accordingly, in case of cutbacks, plaintiff might reasonably expect they would be applied on a theory consistent with the IFBs that in ordering the remaining quantities, its prices would be compared with those of other domestic suppliers at the same locations, and subject to the same cost-enhancing restrictions, but not with those of unrestricted suppliers of foreign fuel, thereby dissipating the balance of payment advantages defendant had made so much of in the IFB. 559 F.2d at 11, App 20a-21a.

Also, when the Department of Defense intended that its Import Quota would be used for jet fuel procurement, as it did up until 1967 and toward the end of 1969, the IFB *expressly* stated the Quota availability. Trial Judge's Findings of Fact No. 3(b) and n.4, App 24c. This statement is absolutely necessary to permit the bidders to supply meaningful prices; it can not be changed during a given contract period without resulting in great confusion. The availability of the Defense Import Quota was a distinct pricing advantage at that time. It could not be viewed as mere "present intent" as so noted in the Court of Claims decision.

The Court's decision virtually ignores the impact of these two contract provisions. Simple fairness and equity require a recognition that this course of conduct resulted in actions which were detrimental to the plaintiff; for the Government

to change the rules during the game can only result in an injustice to the private party.

3. The Court of Claims Erred in Not Following Its Own Rules as to the Presumed Correctness of the Findings of Fact of the Trial Judge and in Not Following Undisputed Facts Stipulated to By the Parties.

Petitioner would like to draw the Supreme Court's attention to a disturbing trend within the Court of Claims which is to ignore its own Rule 147(b).

Rule 147(b) of the U.S. Court of Claims provides:

> (b) Trial Judge's Report: The court may adopt the trial judge's report, including conclusions of fact and law, or may modify it, or reject it in whole or in part, or direct the trial judge to receive further evidence, or refer the case back to him with instructions. Due regard shall be given to the circumstance that the trial judge had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the trial judge shall be presumed to be correct.

This proclivity has been drawn to this Court's attention in the past. As recently as the October 1975 Term, the Supreme Court refused to grant a Writ of Certiorari in a case where the issue was raised as to the Court of Claims failure to follow its own rule as to the presumed correctness of the Findings of Fact of the Trial Judge.[6]

Petitioner submits that the Supreme Court should now review this trend and provide guidelines to that Court as to the conditions and circumstances which justify overcoming

[6] *Northern Helex Co.* v. *United States*, 207 Ct. Cl. 862, 524 F. 2d 707 (1975), cert. denied, 429 U.S. 866 (1976).

the essential presumption of correct fact finding at the Trial level.

There have been prior occasions when this Court has reiterated the importance of the rules of lower federal courts and has supervised the lower Court's adherence to these established rules.[7]

The Court of Claims itself has, from time to time, stressed the importance of following its own rule as to the presumption of correctness of the Findings of Fact established by the Trial Judge. In *Bonnar* v. *United States*, 194 Ct. Cl. 103, 146-147, 483 F.2d 540, 563 (1971), the Court stated:

> In this, as in all cases in which a Commissioner (now Trial Judge) has carefully weighed conflicting evidence, the burden of sustaining exceptions to the findings is far from slight. We start with the double directive that due regard must be given to the Commissioner's opportunity to judge the credibiiltiy of the witnesses and that his factual findings 'will be presumed to be correct.' Rule 48 [now Rule 147(b)]. That presumption is dissipated only by a strong affirmative showing. *** (Citing *Davis* v. *United States*, 164 Ct. Cl. 612, 616-617 (1964).)

In *Davis* v. *United States*, 164 Ct. Cl. 612, 617 (1964), the Court noted that although its function was to act as the ultimate finder of fact, it nevertheless had to rely on the appraisal of the unprejudiced trier, the trial judge, "who has followed a process which generally brings about a correct determination of the facts." In other contexts, the Court

[7] See *Northcross* v. *Board of Education for the Memphis City Schools*, 412 U.S. 427, 429 (1974); *Taylor* v. *McKeithen*, 407 U.S. 191 (1972); *Southern Construction Company* v. *United States*, 371 U.S. 57, 60 (1962); *Duke Power Company* v. *Greenwood County*, 299 U.S. 259 (1936).

has noted that the findings of the Trial Judge are "entitled to great respect", *Gibson* v. *United States*, 176 Ct. Cl. 102, 109 (1966) and are not to be disturbed unless "clearly erroneous". *Bringwald, Inc.* v. *United States*, 167 Ct. Cl. 341, 334 F.2d 639 (1964).

When the Court of Claims issues an opinion with Findings of Fact contrary to those of the Trial Judge, it should be required to explain why the presumption has been overcome. To summarily establish other Findings of Fact without testimonial hearings renders the evidentiary process to the status of a fruitless exercise. A valid reason and explanation for finding otherwise should be required and the Court of Claims should be so reminded. Without this safeguard, the adversary proceeding becomes meaningless and the parties can keep seeking favorable factual determinations at all levels of review.

This issue alone justifies a review of this case by the Supreme Court.

As an illustration of this tendency, the instant case contains three examples.

First, the Court stated, 559 F. 2d at 4, App __, " . . . the offshore IFBs and the domestic IFB *did* overlap, to a certain degree . . . " (Emphasis supplied). It cites IFB Item 365 as evidence of this conclusion. *Id.* That item provided only that the location to which fuel ultimately was to be delivered would be "West Coast offshore." Beyond that description, however, the IFB noted only that the fuel was to be provided at "various Pacific bases," without any further identification. Foreign suppliers in contrast, were to supply fuel for use in Vietnam, Thailand, the Philippines, Okinawa, Japan, Korea, and Taiwan.

But, there is no evidence anywhere in the record to support such a conclusion. There are dozens of "various Pacific bases" that had no direct relationship to the areas mentioned in the offshore IFBs. The Trial Judge rightfully approached this same matter by stating that there "may" have been some overlap among all the IFBs, but these

should be identified during hearings on damages because the initial trial was confined to the issue of liability only. Trial Judge's Op. 9-10, App 8c; 26-27, App 21c).

A finding of fact that at the trial level had properly been left unresolved and reserved for further proof, now at the full Court, has been converted to a factual finding damaging to Petitioner's case. If one accepts the fact as found by the Court, the Government can then argue that Petitioner understood from the beginning that it could be competing with foreign suppliers, a position that erodes its contention that equitably it should only be held to have been in competition with other domestic suppliers. Despite its apparent rejection of the Trial Judge's finding, the Court provides no hint as to why it chose to ignore the usual presumption of correctness.

Second, at 559 F.2d at 10, App 18a, it is stated:

> However, there is no evidence in the record of any foreign supplier, after the announced cutback, supplying the needs of any of the using activities identified for plaintiff's items which that foreign supplier was not already supplying before the cutback. (Footnote omitted).

This particular finding had been requested by the Government in its Requested Finding of Fact dated November 4, 1974. The Trial Judge did not make the requested finding in his Opinion and Findings of Fact. Because the parties had agreed that the trial would be limited to liability, evidence related to this issue of quantum was not introduced by Petitioner. For the Court to revive the rejected Finding of Fact of the Government and to use it for conjectural purposes to speculate where fuel shipments ultimately were made was error. No explanation is provided by the Court as to why it chose to overrule the prior action of the Trial Judge not to make this particular requested Finding of Fact. The Court does not explain why the trial

judge's findings were clearly erroneous nor whether it has a definite and firm conviction that a mistake has been committed. Absent such explanation, its contrary findings are arbitrary, and this court should review them in the exercise of its judicial supervisory powers.

Finally, the Court in a footnote states:

> Furthermore, there is no evidence in the record that the requirements which had been awarded to Coastal States remained after the cutback. 559 F.2d, n.26 at 10, App 18a.

This conclusion is completely erroneous as shown in the Stipulation of Facts agreed to between the parties and contained in the Trial Judge's Opinion. In the Stipulation it was agreed:

> Although specific data showing the actual diminution in need that occurred at each using activity throughout the world is not presently available, it is agreed that, because of the mechanics by which the cutback was implemented the plaintiff experienced a share of the overall cutback that was greater than any actual diminution that may have occurred at the locations or points of use indicated for the bid items that were awarded to plaintiff. App 40c-41c.

It has long been judicial custom that no Court, without overwhelming justification, should establish facts which are contrary to those agreed to and stipulated to by the parties.[8]

This judicial restraint dictates that once the parties have agreed on certain sets of facts, the Court must be bound by

[8] See *Burstein* v. *United States*, 232 F.2d 19 (8th Cir. 1956), *Missouri-Illinois Railroad Co.* v. *United States*, 180 Ct. Cl. 1179, 381 F.2d 1001 (1967); *Bruno New York Industries Corp.* v. *United States*, 169 Ct. Cl. 999, 342 F.2d 75 (1965).

them; it is not "....free to pick and choose at will..." those stipulated facts that it prefers. *Stanley Works v. Federal Trade Commission*, 469 F.2d 498 (2nd Cir. 1972).

Cases brought in the Court of Claims frequently are large and complex and involve the resolution of difficult questions. Factual determinations under these circumstances are vital to the equitable administration of justice. Moreover, the only review of Court of Claims decisions is discretionary, by writ of certiorari to this Court. Therefore, it is vital that the Court of Claims demonstrate restraint in making its factual determinations. The disregard that the Court of Claims shows here for the facts found by the Trial Judge and stipulated to by the parties should not be permitted. Judicial integrity dictates that this Court exercise its supervisory judicial function and mandate that the Court of Claims abide by the terms of its own rules and act in compliance with traditional Judicial procedures.

CONCLUSION

This Court should review this case to arrest any trend within the Court of Claims toward strict literalism, to assist that Court in returning to its historical role as the conscience of the Government, and to provide guidance in the faithful adherence to its own rules. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

John J. Reed
Attorney for Petitioner
1744 R Street, N.W.
Washington, D.C. 20009

Geoffrey Creyke, Jr.
Hudson, Creyke, Koehler and Tacke
Of Counsel

Appendices

APPENDIX A

214 Ct. Cl. 520

In the United States Court of Claims

No. 190–72

(Decided July 8, 1977)

COASTAL STATES PETROCHEMICAL COMPANY v. THE UNITED STATES

John J. Reed, attorney of record, for plaintiff. *Hudson, Creyke, Koehler & Tacke*, of counsel.

Gerald L. Schrader, with whom was *Assistant Attorney General Barbara Allen Babcock*, for defendant.

Before NICHOLS, KASHIWA and BENNETT, *Judges*.

OPINION

KASHIWA, *Judge*, delivered the opinion of the court:

The primary issue in this case is one of contract interpretation. The point in controversy is whether the United States was contractually obligated to purchase from the plaintiff, Coastal States Petrochemical Company ("Coastal States"), the requirements for JP–4 fuel[1] that existed during the contract term. Plaintiff contends that the contract between the parties was basically a requirements type contract and that the United States was

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[1] JP–4 fuel is a volatile mixture of kerosene, raffinate grade gasoline (82 octane), and naptha. Although the fuel, in the United States, is limited in use to military applications, its components can be utilized commercially.

contractually bound to purchase certain of its fuel requirements during the contract period from Coastal States. The United States, on the other hand, denies any such obligation. Its position is that the contract in question was an indefinite quantity type contract and that, in keeping with that type of purchase agreement, the only obligation it owed to plaintiff was to satisfy a minimum purchase requirement.

The case comes before the court on defendant's exceptions to the recommended decision of Trial Judge Harry E. Wood, which he has submitted in accordance with Rule 134(h) on May 25, 1976. Although we borrow from much of the trial judge's recommended opinion, we come to different results.

After having carefully considered the trial judge's recommended decision and findings of fact, the defendant's exceptions thereto, and the parties' briefs, after oral argument, we agree with the defendant that the contract in issue is an indefinite quantity type contract and that the Government in good faith has met all obligations which it had to plaintiff under the contract. Accordingly, the trial judge's findings of fact,[2] recommended decision, and conclusion of law are modified to accord with the facts and law set forth below.

I

Conventional Government Procurement Patterns: The Defense Fuels Supply Center ("DFSC"), Defense Supply Agency, Department of Defense ("DOD"), has the mission of procuring, among other things, JP–4 jet fuel for the military services and federal civil agencies on a worldwide basis.[3] To fulfill that mission, DFSC procures JP–4 jet fuel every 6 months in such enormous quantities that no single

[2] The trial judge's findings of fact, copies of which have been distributed to the parties, are not printed because those essential to the decision appear in this opinion.

[3] Anticipated needs of JP–4 jet fuel for use outside the United States, its territories, and possessions are traditionally obtained by contracts negotiated by the Overseas Division of the DFSC, under the authority of 10 U.S.C. § 2304(a)(6) (1970), with foreign refiners located outside the United States, its territories, and possessions.

supplier is capable of satisfying its demands. A DFSC invitation for bids for such fuel is usually sent to more than 150 suppliers, and multiple awards of some 60 to 80 contracts are invariably necessary to secure the requisite volume of such fuel at the lowest prices obtainable.

To some time in 1967, the Domestic Fuels Division, DFSC, solicited domestic suppliers of JP–4 jet fuel for use in the United States, including Alaska and Hawaii. In so doing, the Domestic Fuels Division utilized the DOD import quota[4] in procuring the fuel from refineries in the Caribbean Sea.

During that same period, DFSC's Overseas Division procured the anticipated needs of United States forces in Europe and in the Western Pacific by contracts; negotiated with foreign refiners located outside the United States, its territories, and possessions, for delivery of JP–4 jet fuel to Europe and to the Western Pacific.

As military operations in the Western Pacific and in Southeast Asia steadily increased, however, defendant found not only that supplies of JP–4 jet fuel normally imported for domestic use were required for shipment to Europe and Southeast Asia but also that it was necessary to procure additional quantities of such fuel from United States domestic sources, at higher prices, for shipment to Southeast Asia and Europe. Thus, by late 1967, a departure from the traditional patterns of procurement of JP–4 jet fuel described above occurred, in that quantities of JP–4 jet fuel needed for use in Europe and in the Western Pacific were included in *domestic* solicitations, with such "overseas" quantities designated for statistical purposes as "restricted to U. S. refined product," in order to return to this country as many procurement dollars as possible.

The Solicitation: On February 5, 1969, DFSC issued bid solicitation DSA 600–69–B–0161 (also "IFB"), involving a 6-month purchase program of a portion of defendant's

[4] Import quotas are allocations granted by the Department of the Interior to historical importers (including DFSC) to import a maximum quantity of a certain number of barrels per day of foreign-finished petroleum products into the United States. The use of DOD's import quota in procuring JP–4 jet fuel was suspended late in 1967.

projected JP–4 jet fuel needs for the period July 1 to December 31, 1969.[5] The solicitation was one of a continuing series of semi-annual, formally advertised invitations for bids issued by the Domestic Fuels Division, DFSC, to supply the anticipated needs of the Army, Navy, and Air Force, and some federal civil agencies, for JP–4 jet fuel for use principally within the United States; consistent with the departure from tradition described above, however, it also included a substantial quantity of such fuel intended for ultimate receipt and use by United States armed forces overseas.

The IFB, issued to 168 firms,[6] involved total estimated JP–4 jet fuel needs of 2,691,091,530 gallons, to be delivered to more than 300 specified military destinations ("using activities") throughout the United States, in Europe, and in the Pacific. The IFB estimate of quantities of JP–4 jet fuel needed for "offshore" use (that is, for use by all of the specified using activities located other than in one of the 50 States or the District of Columbia) was 371,960,000 gallons.

The IFB contained a 41-page schedule of anticipated fuel needs for the period July 1 to December 31, 1969, listing the more than 300 separate military and civilian using activities both within and outside the United States and setting forth an estimate, in gallons, of each such activity's JP–4 jet fuel needs for that 6-month period.

The schedule also grouped the using activities into four geographic areas (East Coast, Gulf Coast, Inland, and West Coast). Bidders were invited to bid on all or any portion of the anticipated fuel needs included in the IFB and were advised of defendant's preference for bids on an origin basis but were also advised that, with the exception of one item, bids could be submitted on either an origin or a destination basis.[7]

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[5] As will appear, defendant issued five other solicitations for bids calling for delivery during that same period of vast amounts of JP–4 jet fuel for overseas needs.

[6] In response to the IFB, defendant received 77 bids on one or more of the more than 300 items contained therein; and 71 domestic suppliers (including plaintiff) were awarded contracts.

[7] A bid, on either an origin or a destination basis, was evaluated by defendant on a least-cost approach, i.e., the lowest laid-down price (cost plus delivery expense) to a particular destination.

The exception referred to was Item 365, designated "West Coast Offshore." As to Item 365, the ultimate destinations of the 189 million gallons of JP–4 jet fuel involved were impossible to predict; so the solicitation indicated that only offers on an origin basis would be considered. With respect to this bid item, the IFB provided that:

> Item 365 is a one time procurement in support of Southeast Asia and in implementation of the Balance of Payments Program. The requirements represented by the above are needed at various Pacific bases. The requirements at individual bases are not certain. Accordingly offers are desired on an origin basis only and destination offers for this item will not be considered. *For evaluation purposes only, the destination will be considered to be Guam.* * * * [Emphasis in original.]

The IFB also contained a "Balance of Payments Restrictions" clause providing that only products refined in the United States were to be considered for those offshore items. However, the balance of payments clause in the domestic IFB did not preclude suppliers which were covered by both an offshore IFB and the domestic IFB from furnishing foreign-refined JP–4 fuel to the offshore using activities; it merely precluded suppliers bidding under the domestic IFB from furnishing foreign-refined JP–4 fuel for the offshore quantitites listed therein.

The IFB also stated that DOD did not at that time intend to use any of its finished products import quota for purchases under the contract.

The offshore portion of the IFB, or 371,960,000 gallons, represented only a fractional part of defendant's total projected overseas needs for JP–4 jet fuel during the second half of 1969. In February and March 1969, five other solicitations for bids calling for delivery, during that same period, of JP–4 jet fuel to defendant for overseas needs were issued.

These five parallel solicitations ("offshore IFBs") were not subject to any balance of payments restrictions, and fuel supplied to defendant pursuant to them was not

limited to "U. S. refined only" product. They invited offers for delivery of JP–4 jet fuel for use in Vietnam, Thailand, the Philippines, Okinawa, Japan, Korea, Taiwan, Turkey, Italy, Libya, the United Kingdom, and Germany. As a result of the offshore IFBs, contracts covering 1,396,304,000 gallons of JP–4 jet fuel were awarded to some 31 foreign suppliers. At the time here relevant, foreign refiners could, and did, underbid domestic refiners subject to balance of payments restrictions.

While most of the overseas points of use, or delivery, specified in the offshore IFB differed from the overseas delivery points specified in the domestic IFB, the offshore IFBs and the domestic IFB did overlap, to a certain degree, in terms of actual points of use, or delivery. For example, domestic IFB Item 365 dealt with the estimated needs of "various Pacific bases" and the offshore IFBs dealt with estimated needs in Vietnam, Thailand, the Philippines, Okinawa, Japan, Korea, and Taiwan.

The Contract Awarded to Coastal States: Plaintiff responded to the IFB on March 14, 1969, and on May 28, 1969, plaintiff was awarded a contract to supply to defendant an estimated 182,516,000 gallons of JP–4 jet fuel for a total contract price of $19,017,842.40. Of this total gallonage amount, 151,200,000 gallons were destined for overseas locations;* the balance, 31,316,000, being for domestic destinations.

The contract thus committed plaintiff to supply to defendant an estimated 30 million gallons of JP–4 jet fuel per month, if ordered, over a 6-month period. However, the contract also contained "final order" option provisions giving defendant a right to add to that obligation on the final order placed under any item of the Schedule and a "Scope of Contract" clause providing in part as follows:

IVB1a SCOPE OF CONTRACT (DFSC 1968 JUN)

(a) The Contractor shall furnish and deliver * * * the supplies and perform the services set forth in the

* Of the total "offshore" gallonage, a total of 100,961,100 gallons were required by the contract to be "refined in the United States"; accordingly, 50,238,900 gallons were not subject to such a restriction.

Contract Schedule, for the prices payable according to the terms thereof, in such quantities as may be ordered by the Ordering Officer during the ordering period specified in the Schedule; in consideration therefor, the Government shall order, accept and pay for, on the terms and subject to the conditions set forth herein, supplies or services having an aggregate value at the prices payable under this contract of not less than $100.00 * * *.

Also, the "Termination for Convenience of the Government" clause in plaintiff's contract expressly provided that it "shall apply only to *orders* placed under this contract." (Emphasis supplied.)

The Contract Cutback: On July 28, 1969, shortly after these contracts became effective, DFSC was notified that worldwide Air Force usage of JP–4 jet fuel during the second half of 1969 would be substantially less than had been originally estimated, largely as a result of the sharp reduction in combat activities in Vietnam. On July 30, 1969, DFSC in turn notified plaintiff (and other United States suppliers) that due to declining worldwide requirements there would be some reduction in JP–4 jet fuel liftings during the 6-month period ending December 31, 1969, and that plaintiff would receive further advice as soon as possible.

On August 29, 1969, the Chief, Domestic Fuels Division, DFSC, wrote to plaintiff in part as follows:

* * * the demand for JP–4 to be supplied under your Contract * * * to the Air Force will be reduced from 182,516,000 gallons to 78,728,950 gallons. The Department of the Air Force is being instructed not to place orders in excess of the revised quantity through 31 December 1969 without prior approval of this Center. * * *

Over the remaining term of plaintiff's contract, the actual reduction from the estimated requirements stated therein amounted to 105,666,968 gallons, or some 57 percent of the initial contract amount.

The Basis Upon Which the Cutback was Implemented: The manner in which defendant decided to, and did, make the cutback in plaintiff's estimated contract amounts just described (and a cutback in the estimated amounts of JP–4

jet fuel set forth in the contracts of 14 other domestic suppliers as well) is at the center of the dispute between the parties.

Upon establishing that the maximum quantities of JP–4 jet fuel under contract to defendant for the period ending December 31, 1969, pursuant to all six of the solicitations described above, were approximately 399 million gallons in excess of the estimated reduced needs of the DOD for that period, DFSC weighed the alternative courses of action available to it. The decision ultimately approved by the Deputy Assistant Secretary of Defense (Supply and Services) was to reduce orders under *all* existing contracts on a most economical basis.

The reduction was carried out on a worldwide basis; fuel needs that remained open under all existing JP–4 jet fuel contracts for the period ending December 31, 1969, were competitively evaluated and were re-allocated among defendant's existing suppliers on the basis of the respective prices they had initially offered. Thus, even though the existing JP–4 contracts had originally been let on the basis of separate prices bid under separate procurements, the reduction in fuel demand, principally in Southeast Asia, became the occasion for a competitive re-evaluation and re-routing of remaining worldwide needs on the basis of price alone. This actually represented a return to the channels of distribution that existed before the peak Vietnam fuel demands.[9]

In the re-evaluation, United States suppliers such as Coastal States were accorded no economic concession for the fact that they were contractually obligated to deliver, in accordance with the balance of payment restrictions in the contract and the foreign product import restrictions, fuel that had been domestically refined and which was higher priced than foreign-refined fuel. In other words, this competitive re-evaluation and re-allocation of remaining fuel demands was carried out notwithstanding the balance

[9] The result of that return to historical patterns was that U. S. Gulf Coast fuel would again cease to be used so extensively in the Pacific, and Caribbean fuel would again be used to meet anticipated needs in Europe and the continental United States.

of payments and import quota restrictions that originally applied in the JP–4 contract that had been awarded to plaintiff.

Following the re-evaluation, anticipated reductions in orderings of JP–4 jet fuel under all existing contracts were made and formally announced to plaintiff and to the 14 other affected companies by letters from DFSC dated August 29, 1969. The total reduction in orderings so announced amounted to 396,744,612 gallons.

Among these 15 suppliers, plaintiff absorbed the greatest share of the total cutback. Its original contract to supply a maximum 182,516,000 gallons was cut to 78,728,950 gallons, approximately a 57 percent reduction of the initial award. This difference of 103,787,050 gallons represented 26 percent of the total cutback that was effected.

As a result of this cutback, plaintiff alleges that it was left with a large excess of JP–4 fuel components over the remaining months of the contract. It is the alleged financial loss attributable to the unanticipated cutback which plaintiff seeks to recover in this action.

Plaintiff contends that the language of the contract, the conduct of the parties, and the commercial setting in which the contract was formed all confirm that defendant was contractually obligated to purchase from plaintiff the requirements for JP–4 jet fuel that existed during the contract term and that, given such an obligation, defendant plainly breached it. To plaintiff the breach occurred during the implementation of the cutback when defendant competitively evaluated both domestic and foreign suppliers on the basis of price alone; the inevitable result of that evaluation was that the reduction would fall entirely upon domestic rather than upon foreign refiners. Plaintiff adds, alternatively, that defendant also failed to live up to the high degree of good faith demanded of it when it failed to warn plaintiff at the outset that cutbacks would be carried out on the basis of price alone.

In defense of this action, defendant contends that the contract language, defendant's need for flexibility, and the conduct of the parties require the conclusion that defendant's only obligation under that contract was to purchase

from plaintiff a minimum of $100 worth of JP–4 jet fuel during the contract period; that under plaintiff's contract plaintiff was not to supply *all* the needs of any of the using activities listed in the IFB; and that when defendant's anticipated needs did not materialize, plaintiff was simply supplanted by lower-priced domestic suppliers who had been awarded contracts under the same bid items. In short, defendant contends that its contract with plaintiff was an indefinite quantity, open-end contract and that the only obligation it owed to plaintiff was to satisfy in good faith a minimum purchase requirement, which it did.

II

A. We agree with the trial judge's reasoning that:

> • • • [b]ecause of the very nature of the procurement (and the product) involved, plaintiff's contract was clearly not such a "requirements" contract in any customary sense. See *Albano Cleaners, Inc.* v. *United States*, 197 Ct. Cl. 450, 455 F. 2d 556 (1972); *Franklin Co.* v. *United States*, • • • [180 Ct. Cl. 666, 381 F. 2d 416 (1967)]; *E. H. Sales, Inc.* v. *United States*, 169 Ct. Cl. 269, 340 F. 2d 358 (1965); *Goldwasser* v. *United States*, 163 Ct. Cl. 450, 325 F. 2d 722 (1963). [T.J. op. at 21–22.]

Plaintiff, either alone or in conjunction with others, did not have an absolute, unconditionally vested contract right to supply JP–4 jet fuel to meet the needs of any *particular* destination. Rather, the parties were cognizant that the procurement would result in a considerable number of separate, incremental contract awards to suppliers on a least-cost basis to defendant. While, in theory, each gallon of JP–4 jet fuel for which defendant awarded plaintiff a contract was, at the time of award, destined for a particular terminal, either within or without the United States, defendant's patent need for flexibility arising from ullage problems, changes in missions of using activities, increases or decreases in contemplated usage at particular using activities, availability of transportation, and changes in priorities of need meant that in actuality any fuel defendant purchased from anyone during the contract

term might go anywhere.[10] These facts all point to an inevitable conclusion that plaintiff's contract with defendant was an indefinite quantity, open-end contract, not a requirements contract.

An indefinite quantity, open-end contract is used in a situation where the United States cannot estimate its needs except in terms of minimums and maximums;[11] whereas a requirements contract by definition contains an "estimated total quantity • • • obtained from the records of previous requirements and consumption • • •."[12]

Plaintiff focuses on these definitions and argues that "the specificity of estimates set out in the subject contract completely undercuts the idea that an indefinite quantities contract was contemplated"; plaintiff also contends that the same conclusion was reached by this court in *E. H. Sales, Inc.* v. *United States*, 169 Ct. Cl. 269, 340 F. 2d 358 (1965), and in *Goldwasser* v. *United States*, 163 Ct. Cl. 450, 325 F. 2d 722 (1963). We do not agree with plaintiff's arguments.

The regulations which define an indefinite quantity contract provide that such a contract should state both a minimum quantity and a maximum quantity and that the maximum "should be as realistic as possible," and further, the regulations provide that "the maximum may be obtained from the records of previous requirements and consumption." We feel that the degree of specificity

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[10] In fact, considerable amounts of plaintiff's origin delivery JP–4 fuel, theoretically designated for overseas use, were delivered to, *inter alia*, Alaska, Florida, Georgia, and South Carolina.

[11] 32 C.F.R. § 3–409.3 (1975) describes indefinite quantity contracts, in pertinent part, as follows:

"3–409.3. *Indefinite Quantity Contracts.*

"(a) *Description.* This type of contract provides for the furnishing of an indefinite quantity, within stated limits, of specific supplies or services, during a specified contract period, with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. The contract shall provide that during the contract period the Government shall order a stated minimum quantity of the supplies or services and that the contractor shall furnish such stated minimum and, if and as ordered, any additional quantities not exceeding a stated maximum which should be as realistic as possible. The maximum may be obtained from the records of previous requirements and consumption, or by other means." • • •

[12] 32 C.F.R. § 3–409.2 (1975).

present in a few of the estimated maximum quantities in the IFB is owing to the precise knowledge of past consumption, not to the precise knowledge of future needs, and therefore provides no basis for determining whether the contract is a requirements or an indefinite quantity type contract. Moreover, the *E. H. Sales, Inc.* and *Goldwasser* cases lend no support to the plaintiff's position.

The contract involved in the *Sales* case listed 183 *particular* pieces of equipment, each specifically described by purpose, size, and manufacturer, which were to be repaired and overhauled by the contractor. Because only 38 of the listed machines were actually delivered for repair and overhaul, the contractor suffered an increase in unit costs and therefore initiated a claim for equitable adjustment under the "Changes" clause in the contract. The Government defended its action by claiming the contract was an indefinite quantity contract and that its obligations were restricted to the minimum dollar amount that had been set out in the "scope" clause of the contract. This court pointed out that there was nothing indefinite about the Government's requirements—at the time of contracting, the Government not only knew how many machines had to be repaired, but it was able to describe each particular machine in detail. We held that to construe that contract as an indefinite quantity contract would be wholly inconsistent with such specificity.[13]

In the instant case, we do not have the specificity that was involved in *Sales*. As previously mentioned, the Government, at the time of contracting for the JP–4 jet fuel, was not describing needs which had already arisen—it was estimating future needs based on past experience. The actual demand would depend upon the vagaries of weather, level of combat engagement, pace of general military operations, transfer of aircraft from one base to another, and loss of aircraft in battle; none of which could be accurately predicted at the time of contracting. Therefore, as we stated in *Sales*:

[13] 169 Ct. Cl. at 274, 340 F. 2d at 361.

> This * * * [indefinite quantities] provision is applicable and entirely proper in a contract where the Government does not know what its requirements will be * * *.[14]

Likewise, the *Goldwasser* case does not lend support to the plaintiff's argument. The contract in *Goldwasser* called for the printing and delivery of a weekly newspaper over a 50-week period in sufficient quantities to supply each employee of the New York Naval Shipyard with a copy. The contract provided for a minimum number of copies per issue, with the Government reserving the right to add increments. When the contracting officer had terminated the contract, the contractor sued. The Government defended the action on the basis of the indefinite quantities clause and the termination for convenience clause.

Although the court rejected the Government's theory that the contract involved in *Goldwasser* was an indefinite quantity type contract, *Goldwasser* does not support Coastal State's argument in the instant case.

There are several crucial distinctions between *Goldwasser* and the instant action. First, in *Goldwasser* the deliveries were to be made weekly and at the fixed minimum quantity (equal to the number of employees at the Shipyard) unless a larger quantity was ordered by the contracting officer. Since the quantities were not indefinite nor were deliveries to be made only at the call of the Government, the contract was not an indefinite quantity, call-type contract. In the instant case, however, deliveries were to be made only when the Government issued an order for them and the quantity was indefinite. Second, Goldwasser was awarded a contract to print all the newspaper copies that were needed at the New York Naval Shipyard during the contract period, whereas Coastal States was not given a contract to supply all the needs of any single using activity. We believe that these facts distinguish the instant action from *Goldwasser*. However, it should be mentioned that the court in *Goldwasser* did recognize the appropriateness of an indefinite quantity

[14] *Id.*

contract in a situation where the Government's need for a product or service is uncertain.

> • • • In such a situation, the indefinite-quantities clause fits the situation; it enables the Government to procure needed supplies but does not commit it to buy too much or at the wrong time.[15]

Nevertheless, plaintiff does not rest its arguments only on the detail with which projected needs were specified. In addition to that, plaintiff focuses on the conduct of the parties and on the express language in the solicitation and award documents, which plaintiff argues reinforce the conclusion that the United States negotiated a requirements type contract.

With relation to the conduct of the parties, plaintiff contends that the formal contract modification which the parties entered into on July 3, 1969,[16] is inconsistent with the idea that the parties were operating within the framework of an indefinite quantity contract. To support its contention, plaintiff refers the court once again to *Sales*.[17] Plaintiff argues that if the United States had understood the contract in issue to be one in which its sole obligation was to purchase no more than $100 worth of fuel, then the formalities of the contract amendment would have been an empty exercise.

We have analyzed the *Sales* case and find it inapposite to the instant case. The modification in *Sales* was contradictory to the indefinite quantity contract concept because it increased the obligations of the parties. The modification which Coastal States and the Government entered into on July 3, 1969, did not call for the sale of any additional product; it merely changed the place and method of delivery within the same service; it in no way altered the total maximum quantity which plaintiff was obligated to deliver, if ordered, or the minimum quantity which the Government was obligated to order. Consequently, we view the modification in this case as completely consistent with

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[15] 163 Ct. Cl. at 455, 325 F. 2d at 724.
[16] The modification is designated as Amendment/Modification No. P001.
[17] 169 Ct. Cl. at 274, 340 F. 2d at 361.

the contract between the parties being an indefinite quantity contract.

We have also examined the express language in the solicitation and award documents, upon which plaintiff relies to reinforce its conclusion that the United States negotiated a requirements type contract.[18] We feel, however, that plaintiff overlooked the fact that the language upon which it relies describes the contractor-seller's commitment, not the Government-buyer's commitment. In other words, the language describes what the contractors, as sellers, must be ready to furnish, not what the Government, as buyer, must order. Accordingly, the language upon which plaintiff relies does not support its theory.

Under the circumstances of this case, we believe that the contract between the parties was an indefinite quantity, open-end contract; in fact, the only appropriate contract form was the indefinite quantity contract.[19] At the time of contracting, the Government's need for JP–4 jet fuel was uncertain. While it was obvious that the Government would need some JP–4 fuel over the course of the contract period, the Government had no idea how much it would need or where it would take delivery. In fact, the Government frequently found it necessary to take a shipment of JP–4 fuel ordered for one destination and reroute all or part of it to another, either because of ullage

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[18] The opening paragraph of the schedule of estimates that formed part of the solicitation documents stated:

SUPPLIES

SUPPLIES TO BE FURNISHED (DFSC MAY 68)

(a) The supplies to be furnished hereunder, F.O.B. delivery points, methods of delivery and estimated quantities are as follows: [Immediately after the above-quoted language there followed the specific breakdown of the award, in terms of items and gallons, that had been given to plaintiff.]

The plaintiff also focuses on language in the "Balance of Payments Restrictions" of the contract, which provides:

> The following items being purchased hereunder are in implementation of the Balance of Payments Program. With regard to those items, the Contractor shall deliver only product which has been refined in the United States: [Following this paragraph is a per-item breakdown of the fuel that was awarded to Coastal States.]

[19] *See, Tennessee Soap Co. v. United States*, 130 Ct. Cl. 154, 126 F. Supp. 439 (1954).

problems at the original destination or because of a more urgent need for it at an alternative destination.[20]

B. Since we interpret the contract as an indefinite quantity, open-end contract, we do not view the minimum obligation clause to be disharmonious with the contract as a whole.[21] However, we must address plaintiff's argument that the United States, in effecting the contract cutbacks, completely ignored the purchasing restrictions that it had initially imposed and upon which it had caused the contractor to rely.

Plaintiff points to two clauses in the solicitation: first, the Import Quota clause, wherein the DOD had stated that it "does not presently intend to utilize any of its 'finished products' import quota for purchases under this solicitation";[22] and second, the Balance of Payments Restrictions clause, wherein the DOD had stated that for certain designated requirements "[o]nly products which have been refined in the United States will be considered under this solicitation for such items."[23] Plaintiff states that on the basis of these two provisions, it concluded that the requirements itemized in the solicitation would involve competition only among domestic suppliers with each offering only domestic-refined fuel. These expectations did not materialize, plaintiff postulates, because of the lack of good faith dealing on the part of the United States when it ignored the IFB purchasing restrictions.

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[20] It should be noted that such diversions, especially those made by reason of insufficient ullage at the original destination, would be contract breaches if the contracts awarded were interpreted to be requirements contracts. Namely, if the instant contract were interpreted to be a requirements contract, so must all the other contracts awarded pursuant to the solicitation be requirements contracts. In that event, if there was insufficient ullage at the original destination, then a diversion to another destination would be a breach of the requirements contract of the supplier who had the contract to supply the alternative destination.

[21] Unlike *Albano Cleaners, Inc.* v. *United States*, 197 Ct. Cl. 450, 455 F. 2d 556 (1972), the contract in this case did not contain a convenience-termination clause which applied to the entire contract; rather, the termination clause in the subject contract permitted termination only of orders actually placed with the supplier. Consequently, we find no provision in the subject contract which conflicts with the indefinite quantities clause.

[22] Clause IE1, Import Quota (DFSC 1968 September).

[23] Clause IE9, Balance of Payments Restrictions (DFSC 1968 September).

We are not sympathetic with plaintiff's position for two reasons: first, we do not believe that the Import Quota clause and the Balance of Payments Restrictions clause support the inference which plaintiff made; and second, we believe that plaintiff assumed the risk of not receiving a contract for all or part of the estimated quantities on which it bid when it bid prices so close to the cut-off point (i.e., the highest price defendant had to agree to pay for the jet fuel it ordered).

On the basis of the Import Quota and the Balance of Payment provisions, we do not believe that plaintiff could have reasonably concluded that it would be in competition on the solicitation quantities with domestic suppliers only. The balance of payments provision applied only to 14 percent of the JP–4 fuel to be procured under the IFB; therefore, foreign-refined products could have been offered under the vast majority of the contract items. Consequently, plaintiff could not reasonably infer from the balance of payment provision that it would not be competing with foreign-refined fuel.[24] With respect to the Import Quota clause, that provision merely stated the *present* intent of the DOD. There was no promise on the part of the Government that it would not use the import quota during the life of the contract. Based on that statement, we do not believe that the plaintiff could reasonably infer that DOD would not at a later date utilize its import quota for purchases under the solicitation.[25]

With relation to plaintiff's bidding practices, plaintiff was well aware that a significant portion of the estimated quantity of JP–4 jet fuel to be procured under the instant solicitation was incremental to the normal needs of the Government and was due to the greatly increased demand caused by the military activity in Southeast Asia. Plaintiff

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[24] There was no strict demarcation between the area supplied under the domestic IFB and the areas supplied under the offshore IFBs. Under IFB Item 365, plaintiff was in competition with the suppliers under the offshore IFBs, who were supplying Southeast Asia. Although the record does not explicitly indicate how much of plaintiff's contract involved an award under Item 365, it appears that the amount is approximately 100 million gallons.

[25] *See, Air Terminal Services, Inc.* v. *United States*, 165 Ct. Cl. 525, 532–35, 330 F. 2d 974, 977–78, *cert. denied*, 379 U. S. 829 (1964).

also realized that when the military activity receded, the quantities of fuel needed would also decline. Therefore, to maximize its profits while the military campaign lasted, plaintiff bid prices that were very close to the cut-off point. Plaintiff's judgment was that contract awards pursuant to the solicitation would place an additional demand on domestic refineries without any corresponding, significant increase in domestic supply capability. In bidding prices so close to the cut-off point in order to maximize its profits, plaintiff necessarily assumed the risk of misjudging the market and not receiving a contract for all or part of the estimated quantities on which it bid. When the Government learned that its actual demand for JP–4 jet fuel would be significantly lower than the original estimated quantities, the Government returned to its historical patterns of supply and returned to the channels of distribution existing prior to the instant solicitation. However, there is no evidence in the record of any foreign supplier, after the announced cutback, supplying the needs of any of the using activities identified for plaintiff's items which that foreign supplier was not already supplying before the cutback.[26] Moreover, there were other domestic suppliers who had contracts to supply the same using activities as did plaintiff. Therefore, plaintiff's assertion that it was cut back for no other reason than the fact that the product it was supplying was higher priced than foreign-refined fuel is incorrect. Plaintiff's fuel was also higher priced than that of almost all other domestic refiners.[27] We believe that is why plaintiff's estimated quantities were cut back so heavily. Had plaintiff bid lower prices, it could have been one of the 50 domestic refiners who were not cut back.

Although we find no evidence that the Government lacked good faith when it dealt with the plaintiff, we must, nevertheless, address plaintiff's charge.

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[26] Furthermore, there is no evidence in the record that the requirements which had been awarded to Coastal States remained after the cutback.

[27] Plaintiff's prices were higher than 61 of the 65 non-exempt domestic refiners.

Plaintiff cites *Gemsco, Inc.* v. *United States*[28] and argues that the Government did not spell out clearly enough all the information which was essential to plaintiff's decision to undertake the fuel contract in the first place. Not only do we not subscribe to plaintiff's argument, we find *Gemsco* inapposite to the instant case.

In *Gemsco* a contractor had been awarded a contract in December 1943 to manufacture metal insignias for Naval uniforms. Notwithstanding that the Government knew that the contractor had begun to manufacture the insignias, the Government redesigned the insignia in April 1944, without notifying the contractor of the change in design. The contractor did not learn of the change until late June 1944, after already having manufactured a considerable quantity of the insignias. This court held that the contracting officer's failure to promptly notify the contractor of the design change was a breach of the "Changes" clause and a violation of the standard of good faith ordinarily required of the Government acting through its agents.

Unlike the *Gemsco* case, the Government here did not stand mute while plaintiff proceeded to perform the contract to its detriment for lack of information known only to the defendant. Plaintiff and the other contractors were informed of the anticipated reduction in JP–4 fuel usage within two days after the DFSC received the information. The DFSC then determined the effect of the reduction on each individual contractor by repeating the contract award evaluation process, this time using the reduced estimates of anticipated usage. The Government then advised the individual contractors of the result so as to permit them to make alternative uses of their refinery capacity. Accordingly we feel that the method by which this cutback was effected was logical, consistent with the purpose of the solicitation, and within the contractual rights of the Government. In other words, the Government acted in good faith—it apprised plaintiff of the new

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[28] 115 Ct. Cl. 209 (1950).

information as soon as possible and withheld no information from plaintiff.

NICHOLS, *Judge*, dissenting:

With all respect, I find myself unable to concur in the panel opinion, able as its analysis is in many respects.

The reader needs to know that (a) the trial judge did not adopt the plaintiff's contention that it had a requirements type contract obliging defendant to purchase from plaintiff its requirements for JP–4 jet fuel that existed during the contract term at the locations comprehended in the contract, and (b) the plaintiff has abandoned its original position, since before us it did not except to the trial judge's opinion and findings but rather, urged that we adopt them without change. In the absence of any quantum figures, it is impossible to say how much of a reduction in the claim this concession effected, but it has to be substantial. Defendant, to a large extent, prevailed before the trial judge, but it is unwilling to pay anything to settle for the losses it is alleged to have caused the plaintiff, and, therefore, it was the excepting party.

I would have adopted the opinion of the trial judge and his conclusion of law in toto. It struck me as an able and fair handling of a novel and sticky situation. His theory may be capsuled as follows. Defendant told plaintiff in the IFB that much of the fuel it supplied had to come from domestic refineries for balance of payment reasons. Moreover, defendant did not intend to make its import quota or any part thereof available. Plaintiff knew that large quantities of foreign made fuel would be obtained under other IFB's for offshore use, and would inevitably be cheaper. Obviously, therefore, the domestic, more costly fuel had some kind of special value to defendant since it did not put plaintiff in price competition with the offshore fuel in evaluating bids. Accordingly, in case of cutbacks, plaintiff might reasonably expect they would be applied on a theory consistent with the IFB's that in ordering the remaining quantities, its prices would be compared with those of other domestic suppliers at the same locations, and

subject to the same cost-enhancing restrictions, but not with those of unrestricted suppliers of foreign fuel, thereby dissipating the balance of payment advantages defendant had made so much of in the IFB. This would have been rather obvious except for the $100 minimum commitment which the court regards as all important but the trial judge, rightly I think, dismisses as standard boilerplate.

Under this theory, plaintiff would not recover anything for disproportionate reductions in procurement from it, whenever and to the extent that the remaining requirements were satisfied by other domestic suppliers working under similar restrictions who had bid lower prices.

The narrow literalism of the decision, and its insensitive insistence on deciding whether the contract was for an indefinite quantity or for requirements as established and mutually exclusive categories, will no doubt cause bidders to scrutinize IFB small print with more care, and insist that what they see as implied should be made express. Also, like so much else in Government contract law it says, in every bid you make, scrutinize your cost allowance for unforeseen contingencies. It is probably far too low.

I am attaching, to clarify my views, the trial judge's analysis of the positions of the parties and of his own intermediate position, which I would adopt.

WOOD, *Trial Judge:* • • •

In its main brief, plaintiff broadly contends that the language of plaintiff's contract, the conduct of the parties, and the commercial setting in which the contract was formed, all confirm that defendant was contractually obligated to purchase from plaintiff the requirements for JP–4 jet fuel that existed during the contract term *at the locations comprehended in the contract awarded to plaintiff*, and that, given such an obligation, defendant plainly breached it. Plaintiff adds, alternatively, that defendant also failed to "live up to the high degree of good faith demanded of it," with the same result.

In equally broad terms, defendant contends that the contract language, defendant's need for flexibility, and the conduct of the parties require the conclusion that defendant's only obligation under that contract was to purchase

from plaintiff a minimum of $100 worth of JP–4 jet fuel during the contract period; that under plaintiff's contract plaintiff was not to supply *all* the needs of any of the using activities listed in the IFB;[15] and that when (as defendant sees it) defendant's anticipated needs did not materialize, plaintiff was simply supplanted by "lower priced *domestic* suppliers" who had been "awarded contracts *under the same bid items.*" (Emphasis supplied.)

In its reply brief, plaintiff alters, and somewhat narrows, its principal line of argument, urging that defendant was contractually obligated to fill all the needs of all the destinations listed in the IFB by purchases of JP–4 jet fuel from plaintiff *and other domestic suppliers* awarded contracts pursuant to that IFB, and with domestically refined fuel, and that plaintiff had, but was denied, the right to supply such needs of the relevant destinations "as was appropriate under its contract" for the entire contract period.

There are inherent in plaintiff's broad position, or positions, ambiguities and undiscussed problems. For one thing, plaintiff largely ignores serious questions respecting plaintiff's right, *vis-a-vis* those other domestic suppliers awarded contracts pursuant to the IFB, to supply JP–4 jet fuel to defendant during the contract period. And, while plaintiff alludes to "appropriate adjustments between [domestic] suppliers," what that phrase means, in connection with this action, is not even hinted at.

Defendant's arguments present some very real difficulties as well. According to defendant, the "contract cutback" was effectuated simply by repetition, in reverse, of "the contract award evaluation process." Defendant asserts that this was logical, consistent with the purposes of the IFB, and within defendant's contract rights, and that plaintiff's "real complaint" is that defendant "filled its needs as much as possible * * * from the lower priced *domestic* suppliers * * *." (Emphasis supplied.)

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[15] In its reply brief, plaintiff in effect concedes that it was not to supply all the needs of any particular destination listed in the IFB, but asserts that this is immaterial.

[The first 14 footnotes were in omitted portion.]

Defendant's view of the case overlooks indisputable facts: that, in the implementation of the cutback necessitated by defendant's having under contract some 399,000,000 gallons of JP–4 jet fuel in excess of needs, defendant competitively evaluated both domestic and foreign suppliers *on the basis of price alone;* that, given the circumstances of this case, the inevitable result of that evaluation was that the reduction would fall entirely upon domestic rather than upon foreign refiners;[16] and that, during the period here relevant, foreign-refined JP–4 jet fuel under contract to defendant pursuant to the offshore IFBs was delivered to the Pacific and to Europe (with consequent impact on the applicable Balance of Payments Program), and, by use of DOD's foreign-refined products import quota, imported into the United States, in lieu of domestically refined JP–4 jet fuel also under contract to defendant as a result of the IFB.

Moreover, the respective arguments of the parties, by their joint failure to recognize either the unitary nature of the IFB and the offshore IFBs, and the multiple contracts defendant awarded to domestic and foreign suppliers as a result of those IFBs, or the significance of the circumstances surrounding the procurements, tend to obscure rather than illuminate.[17] In light of the foregoing, the reaching of proper conclusions respecting the rights and obligations created by the contract is far from easy.

In reaching any such conclusions, however, it is appropriate to "look both to the written terms and to the surrounding circumstances, availing ourselves 'of the same light which the parties possessed when the contract was made.' " *Franklin Co.* v. *United States,* 180 Ct. Cl. 666, 669, 381 F.2d 416, 418 (1967); see also *ITT Arctic Services, Inc.* v. *United States,* 207 Ct. Cl. 743, 751–52, 759, 524 F.2d 680, 683–84, 688 (1975). In this sort of situation, as in others,

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[16] Plaintiff, and 14 other United States firms, were cut back a total of 397,000,000 gallons, while no foreign supplier was cut back at all.

[17] Because of the nature of the several procurements here relevant, the nature of the product involved, and the worldwide scope of those procurements, fitting the case neatly within a requirements, or indefinite quantities, contract mold, as the parties' main briefs do, could be done, if at all, only by considerable forcing.

"courts have never completely shut their eyes to evidence of the parties' shared understanding drawn from the transaction's milieu or working-out." *Franklin Co.* v. *United States, supra*, 180 Ct. Cl. at 669, 381 F.2d at 418. Where, as here, the contractual provisions are indeed anemic, scrutiny of the transaction's surrounding circumstances is not only peculiarly appropriate, but essential.

Defendant's worldwide pattern for procurement of JP–4 jet fuel for the period July 1 to December 31, 1969, serves as a proper and useful starting point for purposes of analyzing the nature of plaintiff's contract, and the mutual rights and obligations thereby created. For that contract term, defendant issued a total of six solicitations for JP–4 jet fuel.

One, the IFB, covered defendant's estimated needs for such fuel during the contract period at more than 300 specified, and separate, using activities (by location) in the United States, Europe, and the Pacific. The "offshore" portion of the IFB was specifically made subject to balance of payments restrictions, with only domestically refined fuel to be acceptable to defendant thereunder. Moreover, the practical meaning and effect of DFSC's explicit renunciation of use of DOD's foreign-refined products import quota in the IFB was that the *domestic* portion of the procurement (representing some 86 percent of the total gallonage of JP–4 jet fuel covered by the IFB) would also be domestically refined fuel, and the parties necessarily so understood.

As a result of the remaining five "offshore" IFBs, defendant contracted to purchase from foreign refiners fuel (not subject to balance of payments restrictions and not domestically refined) which was, by definition, cheaper than domestically refined fuel, for delivery to various specified, and largely if not entirely different, overseas locations.

The IFB itself resulted, and the parties were necessarily cognizant that it would result, in a considerable number of separate, incremental contract awards to domestic suppliers, on a least-cost basis to defendant. While, in theory, each gallon of JP–4 jet fuel for which defendant awarded

plaintiff a contract was, at the moment of award, destined for a particular terminal, either within or without the United States, defendant's patent need for flexibility, arising from ullage problems, changes in missions of using activities, increases or decreases in contemplated usage at particular using activities, availability of transportation, and changes in priorities of need, meant that in actuality any fuel defendant purchased from anyone during the contract term *might* go anywhere, and that too must have been in the minds of the parties.[18]

In these circumstances, the notion that plaintiff, either alone or in conjunction with others, had an absolute, unconditionally vested contract right to supply JP–4 jet fuel to meet the needs of any *particular* destination simply ignores reality. Because of the very nature of the procurement (and the product) involved, plaintiff's contract was clearly not such a "requirements" contract, in any customary sense. See *Albano Cleaners, Inc.* v. *United States*, 197 Ct. Cl. 450, 455 F.2d 556 (1972); *Franklin Co.* v. *United States, supra*; *E. H. Sales, Inc.* v. *United States*, 169 Ct. Cl. 269, 340 F.2d 358 (1965); *Goldwasser* v. *United States*, 163 Ct. Cl. 450, 325 F.2d 722 (1963).

When plaintiff's contract is scrutinized in light of its terms and defendant's pattern of procurement under the IFB, however, it is equally clear that the boilerplate "Scope of Contract" clause on which defendant relies in asserting that its maximum *obligation* to plaintiff was only to purchase $100 worth of JP–4 jet fuel during the contract term, may not properly be so construed. See *ITT Arctic Services, Inc.* v. *United States, supra*; *Contra Costa County Flood Control and Water Conservation District* v. *United States*, 206 Ct. Cl. 413, 512 F.2d 1094 (1975); *Corbino* v. *United States*, 208 Ct. Cl. 1002, 1006 (1976). As this court said in *Albano Cleaners, Inc.* v. *United States, supra*, 197 Ct. Cl. at 459, 455 F.2d at 561:

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[18] In fact, considerable amounts of plaintiff's origin delivery JP–4 jet fuel, theoretically designated for overseas use, were delivered to, *inter alia*, Alaska, Florida, Georgia, and South Carolina.

> • • • Whatever the permissible scope of such an indefinite quantities provision is • • •, such an unusual and unfair interpretation of the clause here involved as defendant proposes could hardly have been in accord with 'the rational intention of the parties' when they entered into this contract, • • • and the court would not be justified in adopting it. [Citations omitted.]

One relevant consideration is that at least some crude oils essential to the production of JP–4 jet fuel must be contracted for on an advance basis (and in some cases 6 to 12 months ahead of scheduled production time); such crude oils acquired for JP–4 jet fuel production can be used to make other salable end products (and JP–4 jet fuel use in the United States is limited exclusively to military applications, with no private or commercial demand), but only if the purchaser's refinery has sufficient, specialized facilities to do so. In 1969, plaintiff did not have sufficient facilities so to process the feed stocks which would be produced from its crude oil purchases made with a view to producing JP–4 jet fuel for defendant. These factors militate strongly against a holding that, while plaintiff was contractually committed to supply to defendant some 1,000,000 gallons of JP–4 jet fuel per day over a 6-month period, defendant's obligation to plaintiff was only to order $100 worth of such fuel during that same period.[19] *Cf.*, *ITT Arctic Services, Inc.* v. *United States, supra; Albano Cleaners, Inc.* v. *United States, supra; Franklin Co.* v. *United States, supra; Goldwasser* v. *United States, supra.*

That aside, however, the IFB's (and the contract's) terms, construed in light of the contractual history and background, point in that same direction. As the court has held in similar circumstances, there was "a shared understanding infused into the anemic words of the contract • • •." *Franklin* v. *United States, supra*, 180 Ct. Cl. at 673, 381 F.2d at 420.

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[19] Plaintiff's contract explicitly stated that each pipeline or tanker delivery would be, minimally, 840,000 gallons. While it is unnecessary so to hold, this provision would be difficult to construe as consistent with defendant's view of the Scope of Contract clause.

Defendant did not advise plaintiff and the other successful domestic bidders pursuant to the IFB that any specific needs would exist at any particular destination, or at all of them (for the IFB dealt in estimated quantities only, and in plaintiff's prior dealings with defendant underlifts of JP–4 jet fuel of an average magnitude of 10 to 15 percent of contract quantities had been experienced), nor did it say even that a successful domestic bidder, alone or with others, would have the right to supply the actual needs of any particular destination. The IFB did indicate clearly, however, that to the extent defendant did have needs at all the destinations covered by the IFB, those needs would (except in extraordinary circumstances) be filled pursuant to the IFB, and with domestically refined fuel. In turn, defendant also indicated as clearly that, in substance, it had, and would exercise, the right to fill those particular needs by orderings on the same basis on which contract awards *pursuant to the IFB* would be made in the first place, *i.e.*, at the least possible cost to defendant.

In short, in the circumstances of this case, plaintiff's contract, construed in the light cast by its history and background, gave plaintiff, in general terms, a right to compete with those other *domestic* suppliers awarded contracts pursuant to the IFB, for whatever requirements for JP–4 jet fuel defendant did have during the contract term at the several destinations covered by the IFB.[20]

The foregoing does not say, and should not be understood to mean, that under no circumstances could defendant receive fuel ordered under the offshore IFBs at the destinations covered by the IFB. An absolute necessity for diversion of ordered foreign fuel because of ullage problems at a destination covered by the offshore IFBs, because of military necessity, or other good and sufficient reason for delivery of such ordered foreign fuel to a destination covered by the IFB, must have been within the contemplation of the parties when they entered into the contract in

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[20] Parenthetically, this construction is confirmed by contract modifications between the parties, both before and after implementation of the cutback, decreasing quantities of items awarded to plaintiff, and adding new items. See *E. H. Sales, Inc.* v. *United States*, 169 Ct. Cl. 269, 340 F.2d 358 (1965).

suit. Thus, to any extent defendant's requirements at the destinations covered by the IFB may have been validly reduced, no breach resulted.

To the extent, however, that defendant purchased JP–4 jet fuel from foreign refiners under contract to it pursuant to the offshore IFBs to satisfy the needs of the various destinations covered by the IFB *on the basis of price alone*, a breach of contract occurred. That action was neither so contemplated nor within defendant's contractual rights. And, while the present record is quite vague as to precisely how defendant met its JP–4 jet fuel needs worldwide during the second half of 1969, the facts surrounding the cutback hereinabove set forth abundantly demonstrate that just such a breach did occur, to plaintiff's detriment. Accordingly, plaintiff is entitled to recover *to the extent it has been damaged by that breach*. Determination of the amount of such recovery is reserved for further proceedings pursuant to Rule 131(c).

It must be added, however, that to the extent defendant had under contract *domestically* refined JP–4 jet fuel in excess of needs at the several destinations covered by the IFB, defendant was well within its contractual rights in declining to order such fuel from plaintiff, if it could instead order such fuel for those several destinations covered by the IFB from "lower priced domestic suppliers" who, with plaintiff, had been awarded contracts pursuant to the IFB.

All of the contracts to supply defendant's estimated needs at the various locations specified in the IFB were awarded as a result of competitive bidding, and on a least-cost basis to defendant. If an excess of domestically refined fuel under contract for such destinations over actual needs at those destinations materialized, defendant was well within its contractual rights in ordering the domestically refined fuel available to it to meet such actual needs (and no more) at the least possible cost.

To the extent, if any, plaintiff here complains that its contract quantities were cut back in consequence of the exercise by defendant of that right, plaintiff is not entitled to recover. On the present record, the effect of that

conclusion on the parties cannot really be determined. Since, however, further proceedings to determine the amount of plaintiff's recovery are in any event required, that issue can also be explored in such proceedings.

One final matter requires brief note. On July 23, 1970, long after the implementation of the cutback, but prior to the commencement of suit in this court, plaintiff sought a contract amendment without consideration, pursuant to Public Law 85–804, 72 Stat. 972, 50 U.S.C. §§ 1431–1435. In making that request, plaintiff stated, *inter alia*, that the contract in suit was of the type "referred to as an indefinite quantity contract," and that defendant's actions thereunder were "within its literal rights under this unusual type of contract * * *." Defendant seizes upon these statements as, in effect, a concession by plaintiff that it has no right to recover herein.

As plaintiff properly points out, the statements are, at best, ambiguous and amorphous. They were, moreover, made not prior to the onset of controversy between the parties, as defendant suggests, but as part of a post-controversy endeavor to obtain equitable relief. In all the circumstances, they deserve, and are given, no weight in determining the rights of the parties to this litigation.

CONCLUSION OF LAW

For the foregoing reasons, we find that the contract between Coastal States and the United States is an indefinite quantities, open-end contract; we also find that the United States has in good faith met all obligations which it had to plaintiff under the contract. Accordingly, the trial judge's findings of fact, opinion, and recommended conclusion of law are modified to accord with the facts and law hereinbefore set forth. Since the court concludes that the defendant is not liable to the plaintiff, the petition is dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 190-72

COASTAL STATES PETROCHEMICAL COMPANY

v.

THE UNITED STATES

Before NICHOLS, *Judge.* Presiding, KASHIWA and BENNETT, *Judges.*

ORDER

This case comes before the court on plaintiff's motion, filed July 22, 1977, for rehearing *en banc* pursuant to Rules 7(d) and 151, with reference to the decision entered herein on July 8, 1977. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the five active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied*, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151,

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

BY THE COURT

/s/ Philip Nichols, Jr.
Philip Nichols, Jr.
Judge, Presiding

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* NICHOLS, Judge, would allow the suggestion for rehearing *en banc* and the motion for rehearing.

Sep. 30, 1977

Received: Oct. 3, 1977

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 190-72

(Filed May 25, 1976)

COASTAL STATES PETROCHEMICAL COMPANY

v.

THE UNITED STATES

John J. Reed, attorney of record, for plaintiff. *Judith Ann Yannello*, of counsel.

Gerald L. Schrader, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

OPINION*

WOOD, *Trial Judge:* In this action, plaintiff, a Texas corporation, contends that under the facts and circumstances described hereinbelow, plaintiff's contract (No. DSA 600-69-D-2007, awarded May 28, 1969) covering the supply by plaintiff of an estimated 182,516,000 gallons of JP-4 jet fuel for a consideration of $19,017,842.40,[1] has been breached by defendant.

*The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

[1]Trial has been limited to the issues of law and fact relating to plaintiff's right to recover, reserving determination of the amount of recovery, if any, for further proceedings.

It is agreed that plaintiff's originally specified contract gallonage was cut to 78,728,950 gallons, or a reduction of 57 percent. In general terms, plaintiff, a domestic supplier, asserts that during the contract period (July to December 31, 1969) defendant was contractually obligated to purchase from it (or from it and other domestic suppliers) defendant's requirements for JP-4 jet fuel "at the locations comprehended in the contract * * *"; that, on the proof, defendant breached that obligation; and that defendant is in any event liable to it for damages because of a "distinct lack of good faith dealing."

Also, in general terms, defendant contends that defendant's obligation to plaintiff under the contract was limited by the Scope of Contract clause to purchasing $100 worth of JP-4 jet fuel; that defendant's actions in effecting the cutback were in good faith and within its rights; and that it is not obligated to plaintiff for any contractual breach.

For reasons which follow, it is concluded that plaintiff is entitled to recover to the extent stated hereinafter.

JP-4 jet fuel is a volatile mixture of kerosene, raffinate grade gasoline (82 octane), and naptha, with a low freeze point. Its use in the United States is limited exclusively to military applications, and there is no private or commercial demand or application for this product. Its components, however, can be utilized commercially.

The Defense Fuels Supply Center ("DFSC"), Defense Supply Agency, Department of Defense ("DOD"), has the mission of procuring, among other things, JP-4 jet fuel for the military services and federal civil agencies on a worldwide basis. To fulfill that mission, DFSC procures JP-4 jet fuel every 6 months, in such enormous quantities that no single supplier is capable of satisfying its demands. A DFSC invitation for bids for such fuel is usually sent to more than 150 suppliers, and multiple awards of some 60 to 80

contracts are invariably necessary to secure the requisite volume of such fuel at the lowest prices obtainable.

To some time in 1967, the Domestic Fuels Division, DFSC, solicited domestic suppliers of, and awarded contracts to such suppliers for, JP-4 jet fuel for use in the United States, including Alaska and Hawaii. In so doing, the Domestic Fuels Division utilized the DOD import quota[2] in procuring approximately 30,000 barrels, or 1,260,000 gallons, of JP-4 jet fuel per day delivered into government-furnished vessels from refineries in the Caribbean Sea. The prices of United States firms for such fuel have traditionally been higher than those of foreign refiners, and were so throughout the period here material.[3]

During that same period, DFSC's Overseas Division procured the anticipated needs of United States forces in Europe and in the Western Pacific by contracts, negotiated with foreign refiners located outside the United States, its territories and possessions, for delivery (or transport) of JP-4 jet fuel to Europe and to the Western Pacific.

As military operations in the Western Pacific and in Southeast Asia steadily increased, however, defendant found not only that supplies of JP-4 jet fuel normally imported for domestic use were required for shipment to Europe and Southeast Asia, but also that it was necessary to procure additional quantities of such fuel from United States domestic sources, at higher prices (in terms of both product and transportation costs), for shipment to

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[2]Import quotas are allocations granted by the Department of Interior to historical importers (including DFSC) to import a maximum quantity of a certain number of barrels per day of foreign petroleum products into the United States. In 1969, DFSC's import quota was 25,375 barrels per day.

[3]Thus, an import quota, or "ticket", had a commercial value at the time here relevant. That value was 3 to 4 cents per gallon, or $1.26 to $1.68 per barrel.

Southeast Asia and Europe. Thus, by (or shortly after) late 1967, a departure from the traditional patterns of procurement of JP-4 jet fuel described above occurred, in that quantities of JP-4 jet fuel needed for use in Europe, and in the Western Pacific, were included in *domestic* solicitations, with such "overseas" quantities designated for statistical purposes as "restricted to U.S. refined product", in order to return to this country as many procurement dollars as possible.[4]

With this background, the events leading up to the contract in suit, and to this litigation, will now be stated.

On February 5, 1969, DFSC issued bid solicitation DSA 600-69-B-0161 (hereinafter "the IFB"), involving a 6-month purchase program of a portion of defendant's projected JP-4 jet fuel needs for the period July 1 to December 31, 1969.[5] The IFB was one of a continuing series of semi-annual, formally advertised invitations for bids issued by the Domestic Fuels Division, DFSC, to supply the anticipated needs of the Army, Navy, and Air Force, and some federal civil agencies, for JP-4 jet fuel for use principally within the United States; consistent with the departure from tradition described above, however, it also included a substantial quantity of such fuel intended for ultimate receipt and use by United States armed forces overseas.

The IFB, issued to 168 firms,[6] involved total estimated

[4]Use of DOD's import quota in procuring JP-4 jet fuel was suspended late in 1967. While such use remained so suspended throughout part of the period here relevant, that import quota was used in connection with implementation of the cutback to be described hereinafter.

[5]As will appear, defendant issued five other solicitations for bids calling for delivery during that same period of vast amounts of JP-4 jet fuel for overseas needs.

[6]In response to the IFB, defendant received 77 bids on one or more of the more than 300 items contained therein, and 71 domestic suppliers (including plaintiff) were awarded contracts.

JP-4 jet fuel needs of 2,691,091,530 gallons, to be delivered to more than 300 specified military destinations (or using activities) throughout the United States, in Europe, and in the Pacific. The IFB estimate of quantities of JP-4 jet fuel needed for "offshore" use (that is, for use by all of the specified using activities located other than in one of the 50 States or the District of Columbia) was 371,960,000 gallons.

The IFB contained a 41-page schedule of anticipated fuel needs for the period July 1 to December 31, 1969, listing (under the captions of item and location)[7] the more than 300 separate military and civilian using activities both within and outside the United States, and setting forth an estimate, in gallons, of each such activity's JP-4 jet fuel needs for that 6-month period. With one exception, discussed below, each item number represented a specific, named activity and location.

The schedule also grouped the using activities into four geographic areas (East Coast, Gulf Coast, Inland, and West Coast). Bidders were invited to bid on all or any portion of the anticipated fuel needs included in the IFB, and were advised of defendant's preference for bids on an origin basis, but were also advised that, with the exception of one item, bids could be submitted on either an origin or a destination basis.[8]

The exception referred to in the preceding two paragraphs was Item 365, designated "West Coast Offshore". As to Item 365, the ultimate destinations of the 189,000,000 gallons of JP-4 jet fuel involved were impossible to predict, and the IFB provided that:

[7]*E.g.*, Item 197 was Albrook Air Force Base, Albrook, Panama, with an estimated need during the contract term of 3,780,000 gallons.

[8]A bid, on either an origin or a destination basis, was evaluated by defendant (and contract awards were made) on a least-cost approach, *i.e.*, the lowest laid down price (cost plus delivery expense) to a particular destination.

> Item 365 is a one time procurement in support of Southeast Asia and in implementation of the Balance of Payments Program. The requirements represented by the above are needed at various Pacific bases. The requirements at individual bases are not certain. Accordingly, offers are desired on an origin basis only and destination offers for this item will not be considered. *For evaluation purposes only, the destination will be considered to be Guam.* * * * [Emphasis in original.]

The offshore, or overseas, portion of the IFB was as follows:

Bid Item	Location	Estimated Gallons
197	Albrook AFB Albrook, Panama	3,780,000
198	Hamble Thameshaven England	41,000,000
199A	Central Europe Europe	50,000,000
199B	Rota Rota, Spain	38,000,000
199C	Goose Bay Labrador	19,320,000
199D	Sondrestrom AB Greenland	3,360,000
199E	Thule AB Greenland	16,000,000
199F	Azores Azores	9,000,000
199G	Nav Sta Argentina Argentina	2,500,000
365	West Coast Offshore Offshore WC	189,000,000
	Total	371,960,000

The IFB also contained a Balance of Payments Restrictions clause providing that only products refined in the United States were to be considered for those offshore items. In effect, that clause precluded suppliers from furnishing foreign-refined JP-4 jet fuel to offshore using activities covered by the IFB.

The IFB also stated that DOD did not intend to use any of its finished products import quota for purchases under the IFB. The effect of this provision was that no offer of foreign-refined fuel would be considered for award if acceptance of the bid required use of DOD's impor quota. While a bidder with its own import quota (and plaintiff had none) who intended to supply any of defendant's domestic needs (*i.e.*, those items in the IFB not subject to balance of payments restrictions) with foreign-refined JP-4 jet fuel could, theoretically, expend its own import quota to do so, this was not an economically realistic alternative, as a practical matter, since that bidder could put the import quota to more profitable use in other ways.

Upon consideration of the IFB with its balance of payments restrictions and import quota clauses, plaintiff reasonably concluded that the IFB involved competition only among domestic suppliers, with each bidder offering only domestically refined fuel. It was clear to plaintiff, moreover, as it would have been to any businessman, that contract awards pursuant to the IFB would increase demand on domestic refineries without any corresponding significant increase in domestic supply capability, and that competition from domestic refiners would thus be substantially reduced. Plaintiff's bid reflected those judgments and, in comparison to other bidders who successfully responded to the IFB, plaintiff's bid prices ranged from "the middle" to, in some instances, very close to the "cut off point", *i.e.*, the highest price defendant had to agree to pay for domestic fuel ordered during the period here material.

The offshore portion of the IFB, or 371,960,000 gallons, represented only a fractional part of defendant's total projected overseas needs for JP-4 jet fuel during the second half of 1969. In February and March 1969, five other solicitations for bids calling for delivery, during that same period, of JP-4 jet fuel to defendant for overseas needs, were issued.

These five parallel solicitations ("the offshore IFBs") were not subject to any balance of payments restrictions, and fuel supplied to defendant pursuant to them was not limited to "U.S. refined only" product. They invited offers for delivery of JP-4 jet fuel for use in Viet Nam, Thailand, the Philippines, Okinawa, Japan, Korea, Taiwan, Turkey, Italy, Libya, the United Kingdom, and Germany. As a result of the offshore IFBs, contracts covering 1,396,304,000 gallons of JP-4 jet fuel were awarded to some 31 foreign suppliers. At the time here relevant, foreign refiners could, and did, underbid domestic refiners subject to balance of payments restrictions.

While most, if not all, of the overseas points of use, or delivery, specified in the offshore IFB differed from the overseas delivery points specified in the IFB, the offshore IFBs and the IFB may have overlapped, to a minor degree, in terms of actual points of use, or delivery, since Item 365 dealt with the estimated needs of "various Pacific bases" and the offshore IFBs dealt with estimated needs in Viet Nam, Thailand, the Philippines, Okinawa, Japan, Korea, and Taiwan.

Plaintiff responded to the IFB March 14, 1969, and, on May 28, 1969, plaintiff was awarded a contract to supply to defendant an estimated 182,516,000 gallons of JP-4 jet fuel for a total contract price of $19,017,842.40. Some 31,316,000 gallons of such fuel were for delivery at destination to four naval air stations, each located in Texas, while the remainder (151,200,000 gallons) was for origin

delivery to the Air Force aboard tanker at plaintiff's Corpus Christi, Texas, plant. Plaintiff's contract did not cover *all* the July 1 - December 31, 1969 estimated needs of *any* particular destination listed in the IFB.

The quantity of fuel awarded plaintiff for tanker delivery at origin was "offshore" gallonage, and plaintiff's contract broke that gallonage down as follows:

Item		Gallonage
1AA		33,600,000
1AB		33,600,000
1AC		33,600,000
1AD		25,200,000
1AE		25,200,000
	Total	151,200,000

Each item represented a particular destination (or area) for the quantity of fuel shown.[9] Of that total gallonage, 16,961,100 gallons of Item 1AA, and all of Items 1AB, 1AD, and 1AE, or a total of 100,961,100 gallons, were required by the contract to be "refined in the United States." It is reasonable to conclude that the intended destination of the balance of the offshore gallonage (50,238,900 gallons) awarded to plaintiff was Hawaii.

Plaintiff's contract contained a "Scope of Contract" clause providing in part as follows:

> IVB1a * * *
>
> (a) The Contractor shall furnish and deliver * * * the supplies and perform the services set forth

[9]When a contract is awarded by defendant on an origin basis for tanker delivery, each gallon of product has been evaluated and in the normal case is theoretically destined for a particular terminal. As to any amounts awarded plaintiff for Item 365, a "one time procurement", the gallonage must have been destined for at least a particular area. In practice, however, diversions are, for many sound reasons, inevitable.

> in the Contract Schedule, for the prices payable according to the terms thereof, in such quantities as may be ordered by the Ordering Officer during the period specified in the Schedule; in consideration therefor, the Government shall order, accept and pay for, on the terms and subject to the conditions set forth herein, supplies or services having an aggregate value at the prices payable under this contract of not less than $100.00 * * *.

The contract thus committed plaintiff to supply to defendant an estimated 30,000,000 gallons of JP-4 jet fuel per month, if ordered, over a 6-month period; Section IVB1a also contained "final order" option provisions giving defendant a right to add to that obligation on the final order placed under any item of the Schedule. Minimum (and maximum) limitations on each single delivery were, however, specified.[10] The contract's Termination for Convenience clause expressly provided that it "shall apply only to *orders* placed under this contract." (Emphasis supplied.)

On July 28, 1969, DFSC was notified that worldwide Air Force usage of JP-4 jet fuel during the second half of 1969 would be substantially less than had been originally estimated, largely as a result of the sharp reduction in combat activities in Viet Nam. On July 30, 1969, DFSC in turn notified plaintiff (and other United States suppliers) that due to declining worldwide requirements there would be some reduction in JP-4 jet fuel liftings during the 6-month period ending December 31, 1969, and that plaintiff would receive further advice as soon as possible.

On August 29, 1969, the Chief, Domestic Fuels Division, DFSC, wrote to plaintiff in part as follows:

[10] *E.g.*, unless plaintiff otherwise agreed, each tanker delivery at Corpus Christi was subject to a 200,000 barrel maximum, and a 20,000 barrel minimum quantity per order.

> * * * the demand for JP-4 to be supplied under your Contract * * * to the Air Force will be reduced from 182,516,000 gallons to 78,728,950 gallons. The Department of the Air Force is being instructed not to place orders in excess of the revised quantity through 31 December 1969 without prior approval of this Center. * * *

Over the remaining term of plaintiff's contract, the actual reduction from the estimated requirements stated therein amounted to 105,666,968 gallons, or some 57 percent of the initial contract amount.

The manner in which defendant decided to, and did, make the cutback in plaintiff's estimated contract amounts just described (and a cutback in the estimated amounts of JP-4 jet fuel set forth in the contracts of 14 other domestic suppliers as well) is at the center of the dispute between the parties, and requires some explication.

Upon establishing that the maximum quantities of JP-4 jet fuel under contract to defendant for the period ending December 31, 1969, pursuant to all six of the solicitations described above, were approximately 399,000,000 gallons in excess of the estimated reduced needs of the Department of Defense for that period, DFSC weighed the alternative courses of action available to it. The decision ultimately approved by the Deputy Assistant Secretary of Defense (Supply and Services) was to reduce orders under *all* existing contracts, on a most economical basis.

The reduction was carried out on a worldwide basis; fuel needs that remained open under *all* existing JP-4 jet fuel contracts for the period ending December 31, 1969, were competitively evaluated and were reallocated among defendant's existing suppliers, on the basis of the respective prices they had initially offered, notwithstanding that those existing contracts had been awarded on the basis of separate prices bid under separate procurements (and at

least in terms of comparison of the IFB to the offshore IFBs having differing provisions). In the reevaluation, plaintiff, although having to compete directly with foreign refiners, was accorded no economic concessions because it had bid on the basis of delivering (and in the circumstances was contractually obligated to deliver) domestically refined fuel which was, by definition, higher priced than foreign-refined fuel.

In short, the reduction in fuel demand, which was the indirect result of a diminution in military usage of JP-4 jet fuel worldwide, but especially in Southeast Asia, became the occasion for a competitive reevaluation among all of defendant's contracts (with defendant being able to make that reevaluation on the basis of returning to the channels of distribution that had existed prior to peak Viet Nam fuel demands) and a rerouting of defendant's remaining worldwide needs on the basis of price alone. Moreover, this return to historical and more economic patterns of worldwide supply[11] entitled some use of DOD's import quota, notwithstanding the IFB's explicit representation that that import quota would not be used for purchases under the IFB.

The practical meaning and effect of the foregoing is clear. The record establishes that during the period ending December 31, 1969, at least some foreign-refined JP-4 jet fuel under contract to defendant pursuant to the offshore IFBs was delivered to the Pacific and to Europe, and (through use of the DOD import quota) to the United States, in lieu of domestically refined (and by definition higher priced) JP-4 jet fuel also under contract to defendant pursuant to the IFB.[12]

[11]The result of that return to historical patterns was that U.S. Gulf Coast fuel would again cease to be used so extensively in the Pacific, and Caribbean fuel would again be used to meet anticipated needs in Europe and the continental United States.

[12]There was, in consequence, a reduction in the applicable Balance of Payments Program.

Following the reevaluation, anticipated reductions in orderings of JP-4 jet fuel under all existing contracts were made and formally announced to plaintiff, and to the 14 other affected companies, by letters from DFSC dated August 29, 1969.[13] Each of the companies affected by the cutback was a United States company, and each was a bidder who had been awarded a contract under the IFB. The total reduction in orderings so announced amounted to 396,744,612 gallons. The cutback did not reach any of the foreign refiners awarded contracts pursuant to the offshore IFBs, nor did it reach 56 domestic suppliers awarded contracts pursuant to the IFB.[14] Given the facts here present, that the reduction would impact upon domestic, rather than upon foreign suppliers, was inevitable.

Plaintiff's share of the total reduction in orderings represented 26 percent of the total cutback effected, and its underlift in gallons far exceeded that of any other company affected by the cutback. While the record does not reflect the actual diminution in need at each using activity throughout the world, it does establish that plaintiff experienced a share of the overall cutback greater than any actual diminution in need that may have occurred at the locations or points of use indicated for the bid items that were awarded to plaintiff.

In its main brief, plaintiff broadly contends that the language of plaintiff's contract, the conduct of the parties, and the commercial setting in which the contract was formed, all confirm that defendant was contractually obligated to purchase from plaintiff the requirements for JP-4 jet fuel that existed during the contract term *at the locations comprehended in the contract awarded to plaintiff*, and that, given such an obligation, defendant plainly

[13]DFSC's August 29, 1969, advice to plaintiff appears above.

[14]Six of these 56 United States companies were small businesses exempted from the reduction evaluation.

breached it. Plaintiff adds, alternatively, that defendant also failed to "live up to the high degree of good faith demanded of it," with the same result.

In equally broad terms, defendant contends that the contract language, defendant's need for flexibility, and the conduct of the parties require the conclusion that defendant's only obligation under that contract was to purchase from plaintiff a minimum of $100 worth of JP-4 jet fuel during the contract period; that under plaintiff's contract plaintiff was not to supply *all* the needs of any of the using activities listed in the IFB;[15] and that when (as defendant sees it) defendant's anticipated needs did not materialize, plaintiff was simply supplanted by "lower priced *domestic* suppliers" who had been "awarded contracts *under the same bid items.*" (Emphasis supplied.)

In its reply brief, plaintiff alters, and somewhat narrows, its principal line of argument, urging that defendant was contractually obligated to fill all the needs of all the destinations listed in the IFB by purchases of JP-4 jet fuel from plaintiff *and other domestic suppliers* awarded contracts pursuant to that IFB, and with domestically refined fuel, and that plaintiff had, but was denied, the right to supply such needs of the relevant destinations "as was appropriate under its contract" for the entire contract period.

There are inherent in plaintiff's broad position, or positions, ambiguities and the undiscussed problems. For one thing, plaintiff largely ignores serious questions respecting plaintiff's right, *vis-a-vis* those other domestic suppliers awarded contracts pursuant to the IFB, to supply JP-4 jet fuel to defendant during the contract period. And, while plaintiff alludes to "appropriate adjustments between [domestic] suppliers", what that phrase means, in connection with this action, is not even hinted at.

[15] In its reply brief, plaintiff in effect concedes that it was not to supply all the needs of any particular destination listed in the IFB, but asserts that this is immaterial.

Defendant's arguments present some very real difficulties as well. According to defendant, the "contract cutback" was effectuated simply by repetition in reverse of "the contract award evaluation process". Defendant asserts that this was logical, consistent with the purposes of the IFB, and within defendant's contract rights, and that plaintiff's "real complaint" is that defendant "filled its needs as much as possible * * * from the lower priced *domestic* suppliers * * *." (Emphasis supplied.)

Defendant's view of the case overlooks indisputable facts; that, in the implementation of the cutback necessitated by defendant's having under contract some 399,000,000 gallons of JP-4 jet fuel in excess of needs, defendant competitively evaluated both domestic and foreign suppliers, *and on the basis of price alone;* that, given the circumstances of this case, the inevitable result of that evaluation was that the reduction would fall entirely upon domestic rather than upon foreign refiners;[16] and that, during the period here relevant, foreign-refined JP-4 jet fuel under contract to defendant pursuant to the offshore IFBs was delivered to the Pacific and to Europe (with consequent impact on the applicable Balance of Payments Program), and, by use of DOD's foreign-refined products import quota, imported into the United States, in lieu of domestically refined JP-4 jet fuel also under contract to defendant as a result of the IFB.

Moreover, the respective arguments of the parties, by their joint failure to recognize either the unitary nature of the IFB and the offshore IFBs, and the multiple contracts defendant awarded to domestic and foreign suppliers as a result of those IFBs, or the significance of the circumstances surrounding the procurements, tend to obscure

[16] Plaintiff, and 14 other United States firms, were cut back a total of 397,000,000 gallons, while no foreign supplier was cut back at all.

rather than illuminate.[17] In light of the foregoing, the reaching of proper conclusions respecting the rights and obligations created by the contract is far from easy.

In reaching any such conclusions, however, it is appropriate to "look both to the written terms and to the surrounding circumstances, availing ourselves 'of the same light which the parties possessed when the contract was made.'" *Franklin Co. v. United States*, 180 Ct. Cl. 666, 669, 381 F.2d 416, 418 (1967); see also *ITT Arctic Services, Inc. v. United States*, 207 Ct. Cl. 743, 751-52, 759, 524 F.2d 680, 683-84, 688 (1975). In this sort of situation, as in others, "courts have never completely shut their eyes to evidence of the parties' shared understanding drawn from the transaction's milieu or working-out." *Franklin Co. v. United States, supra*, 180 Ct. Cl. at 669, 381 F.2d at 418. Where, as here, the contractual provisions are indeed anemic, scrutiny of the transaction's surrounding circumstances is not only peculiarly appropriate, but essential.

Defendant's worldwide pattern for procurement of JP-4 jet fuel for the period July 1 to December 31, 1969, serves as a proper and useful starting point for purposes of analyzing the nature of plaintiff's contract, and the mutual rights and obligations thereby created. For that contract term, defendant issued a total of six solicitations for JP-4 jet fuel.

One, the IFB, covered defendant's estimated needs for such fuel during the contract period at more than 300 specified, and separate, using activities (by location) in the United States, Europe, and the Pacific. The "offshore" portion of the IFB was specifically made subject to balance

[17] Because of the nature of the several procurements here relevant, the nature of the product involved, and the worldwide scope of those procurements, fitting the case neatly within a requirements, or indefinite quantities, contract, mold, as the parties' main briefs do, could be done, if at all, only by considerable forcing.

of payments restrictions, with only domestically refined fuel to be acceptable to defendant thereunder. Moreover, the practical meaning and the effect of DFSC's explicit renunciation of use of DOD's foreign-refined products import quota in the IFB was that the *domestic* portion of the procurement (representing some 86 percent of the total gallonage of JP-4 jet fuel covered by the IFB) would also be domestically refined fuel, and the parties necessarily so understood.

As a result of the remaining five "offshore" IFBs, defendant contracted to purchase from foreign refiners fuel (not subject to balance of payments restrictions and not domestically refined) which was, by definition, cheaper than domestically refined fuel, for delivery to various specified, and largely if not entirely different, overseas locations.

The IFB itself resulted, and the parties were necessarily cognizant that it would result, in a considerable number of separate, incremental contract awards to domestic suppliers, on a least-cost basis to defendant. While, in theory, each gallon of JP-4 jet fuel for which defendant awarded plaintiff a contract was, at the moment of award, destined for a particular terminal, either within or without the United States, defendant's patent need for flexibility, arising from ullage problems, changes in missions of using activities, increases or decreases in contemplated usage at particular using activities, availability of transportation, and changes in priorities of need, meant that in actuality any fuel defendant purchased from anyone during the contract term *might* go anywhere, and that too must have been in the minds of the parties.[18]

In these circumstances, the notion that plaintiff, either alone or in conjunction with others, had an absolute, un-

[18] In fact, considerable amounts of plaintiff's origin delivery JP-4 jet fuel, theoretically designated for overseas use, were delivered to, *inter alia*, Alaska, Florida, Georgia, and South Carolina.

conditionally vested contract right to supply JP-4 jet fuel to meet the needs of any *particular* destination simply ignores reality. Because of the very nature of the procurement (and the product) involved, plaintiff's contract was clearly not such a "requirements" contract, in any customary sense. See *Albano Cleaners, Inc. v. United States*, 197 Ct. Cl. 450, 455 F.2d 556 (1972); *Franklin Co. v. United States, supra; E. H. Sales, Inc. v. United States*, 169 Ct. Cl. 269, 340 F.2d 358 (1965); *Goldwasser v. United States*, 163 Ct. Cl. 450, 325 F.2d 722 (1963).

When plaintiff's contract is scrutinized in light of its terms and defendant's pattern of procurement under the IFB, however, it is equally clear that the boilerplate "Scope of Contract" clause on which defendant relies in asserting that its maximum *obligation* to plaintiff was only to purchase $100 worth of JP-4 jet fuel during the contract term, may not properly be so construed. See *ITT Arctic Services, Inc. v. United States, supra; Contra Costa County Flood Control and Water Conservation District v. United States*, 206 Ct. Cl. 413, 512 F.2d 1094 (1975); *Corbino v. United States*, Ct. Cl. No. 394-72, decided January 9, 1976 (Order, p. 6). As this court said in *Albano Cleaners, Inc. v. United States, supra*, 197 Ct. Cl. at 459, 455 F.2d at 561:

> * * * Whatever the permissible scope of such an indefinite quantities provision is * * *, such an unusual and unfair interpretation of the clause here involved as defendant proposes could hardly have been in accord with 'the rational intention of the parties' when they entered into this contract, * * * and the court would not be justified in adopting it. [Citations omitted.]

One relevant consideration is that at least some crude oils essential to the production of JP-4 jet fuel must be contracted for on an advance basis (and in some cases 6 to 12 months ahead of scheduled production time); such crude oils acquired for JP-4 jet fuel production can be used to

make other salable end products (and JP-4 jet fuel use in the United States is limited exclusively to military applications, with no private or commercial demand), but only if the purchaser's refinery has sufficient, specialized facilities to do so. In 1969, plaintiff did not have sufficient facilities so to process the feed stocks which would be produced from its crude oil purchases made with a view to producing JP-4 jet fuel for defendant. These factors militate strongly against a holding that, while plaintiff was contractually committed to supply to defendant some 1,000,000 gallons of JP-4 jet fuel per day over a 6-month period, defendant's obligation to plaintiff was only to order $100 worth of such fuel during that same period.[19] *Cf., ITT Arctic Services, Inc. v. United States, supra; Albano Cleaners, Inc. v. United States, supra; Franklin Co. v. United States, supra; Goldwasser v. United States, supra.*

That aside, however, the IFB's (and the contract's) terms, construed in light of the contractual history and background, point in that same direction. As the court has held in similar circumstances, there was "a shared understanding infused into the anemic words of the contract * * *." *Franklin v. United States, supra*, 180 Ct. Cl. at 673, 381 F.2d at 420.

Defendant did not advise plaintiff and the other successful domestic bidders pursuant to the IFB that any specific needs would exist at any particular destination, or at all of them (for the IFB dealt in estimated quantities only, and in plaintiff's prior dealings with defendant underlifts of JP-4 jet fuel of an average magnitude of 10 to 15 percent of contract quantities had been experienced), nor did it say even that a successful domestic bidder, alone or with others, would have the right to supply the actual needs

[19] Plaintiff's contract explicitly stated that each pipeline or tanker delivery would be, minimally, 840,000 gallons. While it is unnecessary so to hold, this provision would be difficult to construe as consistent with defendant's view of the Scope of Contract clause.

of any particular destination. The IFB did indicate clearly, however, that to the extent defendant did have needs at all the destinations covered by the IFB, those needs would (except in extraordinary circumstances) be filled pursuant to the IFB, and with domestically refined fuel. In turn, defendant also indicated as clearly that, in substance, it had, and would exercise, the right to fill those particular needs by orderings on the same basis on which contract awards *pursuant to the IFB* would be made in the first place, *i.e.*, at the least possible cost to defendant.

In short, in the circumstances of this case, plaintiff's contract, construed in the light cast by its history and background, gave plaintiff, in general terms, a right to compete with those other *domestic* suppliers awarded contracts pursuant to the IFB, for whatever requirements for JP-4 jet fuel defendant did have during the contract term at the several destinations covered by the IFB.[20]

The foregoing does not say, and should not be understood to mean, that under no circumstances could defendant receive fuel ordered under the offshore IFBs at the destinations covered by the IFB. An absolute necessity for diversion of ordered foreign fuel because of ullage problems at a destination covered by the offshore IFBs, because of military necessity, or other good and sufficient reason for delivery of such ordered foreign fuel to a destination covered by the IFB, must have been within the contemplation of the parties when they entered into the contract in suit. Thus, to any extent defendant's requirements at the destinations covered by the IFB may have been validly reduced, no breach resulted.

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[20]Parenthetically, this construction is confirmed by contract modifications between the parties, both before and after implementation of the cutback, decreasing quantities of items awarded to plaintiff, and adding new items. See *E.H. Sales, Inc. v. United States*, 169 Ct. Cl. 269, 340 F.2d 358 (1965).

To the extent, however, that defendant purchased JP-4 jet fuel from foreign refiners under contract to it pursuant to the offshore IFBs to satisfy the needs of the various destinations covered by the IFB *on the basis of price alone*, a breach of contract occurred. That action was neither so contemplated nor within defendant's contractual rights. And, while the present record is quite vague as to precisely how defendant met its JP-4 jet fuel needs worldwide during the second half of 1969, the facts surrounding the cutback hereinabove set forth abundantly demonstrate that just such a breach did occur, to plaintiff's detriment. Accordingly, plaintiff is entitled to recover *to the extent it has been damaged by that breach*. Determination of the amount of such recovery is reserved for further proceedings pursuant to Rule 131(c).

It must be added, however, that to the extent defendant had under contract *domestically* refined JP-4 jet fuel in excess of needs at the several destinations covered by the IFB, defendant was well within its contractual rights in declining to order such fuel from plaintiff, if it could instead order such fuel for those several destinations covered by the IFB from "lower priced domestic suppliers" who, with plaintiff, had been awarded contracts pursuant to the IFB.

All of the contracts to supply defendant's estimated needs at the various locations specified in the IFB were awarded as a result of competitive bidding, and on a least-cost basis to defendant. If an excess of domestically refined fuel under contract for such destinations over actual needs at those destinations materialized, defendant was well within its contractual rights in ordering the domestically refined fuel available to it to meet such actual needs (and no more) at the least possible cost.

To the extent, if any, plaintiff here complains that its contract quantities were cut back in consequence of the exercise by defendant of that right, plaintiff is not entitled to recover. On the present record, the effect of that con-

clusion on the parties cannot really be determined. Since, however, further proceedings to determine the amount of plaintiff's recovery are in any event required, that issue can also be explored in such proceedings.

One final matter requires brief note. On July 23, 1970, long after the implementation of the cutback, but prior to the commencement of suit in this court, plaintiff sought a contract amendment without consideration, pursuant to Public Law 85-804, 72 Stat. 972, 50 U.S.C. §§ 1431-1435. In making that request, plaintiff stated, *inter alia*, that the contract in suit was of the type "referred to as an indefinite quantity contract", and that defendant's actions thereunder were "within its literal rights under this unusual type of contract * * *." Defendant seizes upon these statements as, in effect, a concession by plaintiff that it has no right to recover herein.

As plaintiff properly points out, the statements are, at best, ambiguous and amorphous. They were, moreover, made not prior to the onset of controversy between the parties, as defendant suggests, but as part of a post-controversy endeavor to obtain equitable relief. In all the circumstances, they deserve, and are given, no weight in determining the rights of the parties to this litigation.

FINDINGS OF FACT

1. (a) Plaintiff is a corporation organized and existing under the laws of the State of Texas.

(b) In this action, plaintiff contends that, under the facts and circumstances hereinafter set forth, defendant breached its contract (No. DSA 600-69-D-2007, awarded to plaintiff May 28, 1969) covering the supply of an estimated 182,516,000 gallons of JP-4 jet fuel, for a consideration of $19,017,842.40, with resulting damages to plaintiff in the amount of $1,934,852.

(c) Pursuant to Rule 131(c)(1), trial of this cause was limited to the issues of law and fact relating to plaintiff's right to recover, reserving determination of the amount of recovery, if any, for further proceedings.

2. JP-4 jet fuel is a mixture of kerosene, raffinate grade gasoline (82 octane) and naptha. It is volatile, with a low freeze point, and its use in the United States is limited exclusively to military applications, with no private or commercial demand or application for it. The components of JP-4 jet fuel can, however, be utilzied commercially. For example, kerosene can be sold as such or as #2 heating oil, while raffinate and naptha, after further processing, can be converted into commercially marketable gasoline.

3. (a) To some time in 1967, demand for JP-4 jet fuel was relatively low, and a greater supply of such fuel was available than was the case subsequently, at the height of military activity in Southeast Asia. During that period, the Domestic Fuels Division, Defense Fuels Supply Center ("DFSC"), Defense Supply Agency, Department of Defense, solicited domestic suppliers of, and awarded contracts to such suppliers for, JP-4 jet fuel for use in the United States, including Alaska and Hawaii. In doing so, the Domestic Fuels Division utilized the Department of Defense import quota in procuring approximately 30,000 barrels, or 1,260,000 gallons,[1] of JP-4 jet fuel per day delivered into government-furnished vessels from refineries in the Caribbean Sea. During that same period, the Overseas Division, DFSC, procured the anticipated needs of United States forces in Europe by contracts, negotiated with foreign refiners located outside the United States, its territories, and possessions, for delivery in Europe and in the Caribbean area for transport to Europe; the anticipated needs of United States forces in the Western Pacific area were met by contracts negotiated with such foreign refiners for

[1] A barrel equals 42 gallons of JP-4 jet fuel.

delivery into government vessels at points in Japan and the Arabian Gulf.[2]

(b) As government demand for JP-4 jet fuel to support steadily increasing military operations in the Western Pacific and in Southeast Asia (Viet Nam and Thailand) grew, however, defendant found not only that supplies of such fuel normally offered for, and imported for, domestic use were required for shipment to Southeast Asia and Europe, but also that it became necessary to procure additional quantities of such fuel from United States domestic sources, at higher prices (in terms of both product and transportation costs), for shipment to Southeast Asia and Europe.[3] At that time, late in 1967, use of the Department of Defense import quota in procuring JP-4 jet fuel was suspended.[4] That quota was, however, again used, to some extent, during the period here material. Although the transportation cost of moving such fuel from the Gulf Coast of the United States to Europe was more than that of moving such fuel from the Caribbean to Europe, there was a departure from traditional patterns of procurement, in that quantities of such fuel needed for Europe were included in domestic solicitations and were designed for statistical purposes as "restricted to U.S. refined product", for credit to the International Balance of Payments Program (to return

[2] Plaintiff is a United States Gulf Coast source; Gulf Coast product generally supplied points in the Gulf Coast and West Coast areas of the United States.

[3] The prices of United States firms for such fuel were traditionally higher than those of foreign refiners, and were so throughout the period here material.

[4] See finding 19(c), n.26, *infra*. When DFSC intends to use the DOD import quota to procure JP-4 jet fuel, as it did until 1967, and did again toward the end of 1969, the invitation for bids specifically so states. Since import quotas are subject to adjustment on notice from the Department of Interior, however, the statement is one of intention only, and, if bid prices on foreign jet fuel received in response to such an IFB prove unreasonable, DFSC is not bound to expend its import quota on such foreign fuel.

to the United States as many procurement dollars as possible). Eventually, domestic solicitations for JP-4 jet fuel also came to include quantities designated in the same way to be used in the Western Pacific in support of operations in Viet Nam and Thailand, as offerings of such fuel from Caribbean, Arabian Gulf, and Japanese suppliers ceased to be sufficient for that purpose. The invitation for bids which resulted in the contract in suit was just such a "domestic" solicitation. See finding 8, *infra*.

4. (a) During the period here relevant, plaintiff was engaged in the business of refining crude oil into a variety of blend stocks which it used to produce motor gasolines, home heating oils, diesel fuels, heavy fuel oils, petrochemicals (including benzene, zylene and cumene), and JP-4 jet fuel. Plaintiff operated one refinery, located at Corpus Christi, Texas, with an output of approximately 80,000 barrels per day and a total storage capacity[5] (for feed stocks, intermediate blend stocks, and finished products) of approximately 4,000,000 barrels. Sales to defendant (primarily of JP-4 jet fuel, but also of some diesel fuel) accounted for roughly 20 to 25 percent of plaintiff's total sales volume.

(b) During the period here relevant, plaintiff's refining capacity exceeded its crude oil production capacity, and it therefore purchased crude oil from other producers. A refinery operation requires advance planning with respect to the products it intends to market, and the purchase of intended feed stocks requires similar planning. Feed stocks essential to JP-4 jet fuel production (and the production of other refinery products) are contracted for on an advance basis which ranges in some cases from 6 to even

[5] In view of the bulk weight and fluid nature of crude oil and petroleum products, petroleum storage facilities are expensive. And, JP-4 jet fuel cannot simply be put under canvas in an open storage space. An oil tanker, for example, can be unloaded only into oil storage facilities.

12 months ahead of scheduled production time; some feed stock purchases, however, can be made on a month-to-month basis.

(c) In their natural state, the crude oils used in a refinery operation vary significantly, ranging from those which are essentially asphalt in composition to those which are nearly all gasoline as they come out of the ground. A refinery endeavors to purchase the type or types of crude oil that will, on processing, yield the end product the refinery intends to sell. During the period here relevant, plaintiff was able, to some extent, selectively to purchase the types of crude oils, condensates, and distillates that would provide it with a relatively large volume of low boiling point materials (generally referred to as napthas), a principal component of JP-4 jet fuel.

(d) Purchased crude oils desirable for use in the production of JP-4 jet fuel can be used for the manufacture of other end products (such as fuel oil, diesel oil, and motor gasoline), provided the refinery has adequate facilities to enable it to increase the otherwise low octane of the naptha-type products that constitute approximately 70 percent of JP-4 jet fuel, and, despite lead time requirements, most refineries do have a latitude to make changes in their planned product mix. Absent specialized equipment, however, the extent of permissible change in that mix is relatively small. At the time here relevant, plaintiff was in the process of building additional facilities necessary to step up the octane levels of its blend stocks which would be produced from the crude oil purchases it had made with a view to production of JP-4 jet fuel.

5. On December 24, 1968, the Department of Interior announced finished petroleum product import allocations for the period January 1 to December 31, 1969. The said allocations were based upon historical importers[6] (in-

[6]Two were Canadian firms, with an allocation of two barrels per day each. The balance were United States firms.

cluding DFSC) to import a maximum daily quantity of 76,461 barrels of finished petroleum products (such as liquified gases, gasoline, jet fuel, asphalt, and lubricating oils) into the United States. DFSC's portion of this total allowable import quantity was 25,375 barrels per day. Plaintiff was not among those entities authorized by the Department of Interior to bring foreign finished petroleum product into the United States.

6. (a) DFSC has the mission of procuring bulk and packaged petroleum products for the military services and federal civil agencies on a worldwide basis. To fulfill its mission, DFSC procures JP-4 jet fuel every 6 months, in such enormous quantities that no single supplier is capable of supplying DFSC's demand. When DFSC issues an invitation for bids for JP-4 jet fuel, it is usually sent to more than 150 suppliers, and multiple awards of some 60 to 80 contracts are invariably required to secure the necessary volume of such fuel at the lowest prices obtainable.

(b) At the time here relevant, DFSC used a computer evaluation of bids in making contract awards for the "domestic" supply of JP-4 jet fuel, because the process of evaluation and multiple, incremental, awards following receipt of responses to an invitation for bids, at the least possible cost to defendant, is a highly complex one. The computer evaluation produces an ideal least-cost solution, but one which is based on assumptions necessary to the process of evaluation of bids and seldom realized in practice, because of production delays at refineries, unavailability of transportation, ullage[7] problems, changes in the scheduled use of aircraft or missions, and the like. Too, priorities of need for JP-4 jet fuel at the time of con-

[7]Ullage is empty storage space for petroleum products, and a decline in anticipated usage at a particular using facility can result in an unanticipated lack of ullage, thereby requiring a diversion of a shipment of fuel from that using facility to another storage facility with sufficient ullage to handle the fuel.

tract award can and do change. Thus, while it would be logical for defendant to take JP-4 jet fuel delivered under a particular item of a "domestic" invitation for bids for use only at the using activity listed in the invitation after that particular item, it is not always possible to do so, and defendant must necessarily retain considerable flexibility in the routing and unloading of JP-4 jet fuel ordered by DFSC under contracts it has awarded to such suppliers.

7. Prior to the time here relevant, plaintiff had been awarded a number of contracts to furnish JP-4 jet fuel to defendant. Under those previous contracts, plaintiff had experienced an average governmental "lift" rate (that is, the percentage of the amount of such fuel actually purchased by defendant under the contracts to that amount covered by the said contracts) of 85 to 90 percent. The reason for an average underlift of those proportions does not appear. There is no evidence that plaintiff ever complained to defendant of an "underlift" in connection with such previous contracts, and plaintiff was aware of the risk of, and "able to swing with", an underlift of that approximate magnitude.

8. (a) On or about February 5, 1969, the United States, acting through DFSC, issued bid solicitation IFB DSA 600-69-B-0161 (hereinafter "the IFB"). The IFB involved a 6-month purchase program of a portion[8] of defendant's projected JP-4 jet fuel needs during the period July 1 to December 31, 1969, and was one of a continuing series of semi-annual, formally advertised, invitations for bids issued by the Domestic Fuels Division, DFSC, to supply the anticipated needs of the Army, Navy, and Air Force, and some civil agencies of the government, for JP-4 jet fuel for use principally within the United States. The IFB also included, however, a substantial quantity of JP-4 jet fuel, for the account of the Air Force, intended for ultimate receipt

[8]See finding 13(a), *infra*.

and use by United States armed forces overseas. *Cf.* finding 3(b), *supra*.

(b) The IFB involved total estimated JP-4 jet fuel needs of 2,691,091,530 gallons, to be delivered to various specified military destinations throughout the United States and to certain bases in Europe and the Pacific.[9] The IFB estimate of quantities of JP-4 jet fuel needed for offshore use (*i.e.*, for use by using activities located other than in one of the 50 States or the District of Columbia) was 371,960,000 gallons.

(c) The IFB contained a 41-page itemized schedule of anticipated fuel needs for the period July 1 to December 31, 1969. The said schedule numbered and grouped the more than 300 military and civilian activities covered by the IFB into four geographic areas (East Coast, Gulf Coast, Inland, and West Coast), and provided an estimate (expressed in gallons) of the anticipated fuel needs for each item numbered activity for that period. With one exception (Item 365), each item number represented a specific, named activity and location. The IFB invited bidders to bid on all or any portion of the anticipated fuel needs included in the IFB, stated a preference for bids on an origin basis,[10] and advised bidders that (with the exception of Item 365) bids could be submitted on either an origin or a destination

[9]The IFB was issued to 168 firms: 77 submitted bids on one or more of the more than 300 items contained in the IFB, and 71 were awarded contracts pursuant to the IFB. See finding 6(a), *supra*. It is reasonable to conclude from the record that all of the successful bidders were domestic suppliers.

[10]Original delivery would permit defendant to use government-furnished transportation, unless a supplier was able to bid a delivered-at-destination price less expensive than the sum of an F.O.B. origin price plus the cost of government transportation. Bidders were requested to offer product delivered at origin even if also offering product on a delivered-at-destination basis.

basis.[11] As to Item 365 (designated as "West Coast Offshore"),[12] the IFB stated that:

> Item 365 is a one time procurement in support of Southeast Asia and in implementation of the Balance of Payments Program. The requirements represented by the above [*i.e.*, 189,000,000 gallons] are needed at various Pacific bases. The requirements at individual bases are not certain. Accordingly offers are desired on an origin basis only and destination offers for this item will not be considered. *For evaluation purposes only the destination will be considered to be Guam.* * * * (Emphasis in original.)]

9. The offshore, or overseas, portion of the IFB (finding 8(b), *supra*), amounting to 371,960,000 gallons, listed locations and estimated gallonage as follows:

Bid Item	Location	Estimated Gallons
197	Albrook AFB Albrook, Panama	3,780,000
198	Hamble Thameshaven England	41,000,000
199A	Central Europe Europe	60,000,000[13]

[11] Whether a bid is submitted on an origin or a destination basis, it is evaluated (and contract awards are made) on a least-cost approach, *i.e.*, the lowest laid down price (cost plus delivery expense) to a particular destination.

[12] Item 365 was designed to insure notice to bidders that, as to Item 365, destination bids were unacceptable because ultimate destinations were impossible to predict; the actual point of delivery of that amount of fuel might be any of numerous Pacific military bases, depending upon need.

[13] By later amendment to the IFB, this amount was reduced to 50,000,000 gallons. The total of 371,960,000 gallons for offshore use reflects this reduction.

199B	Rota Rota, Spain	38,000,000
199C	Goose Bay Labrador	19,320,000
199D	Sondestrom AB Greenland	3,360,000
199E	Thule AB Greenland	16,000,000
199F	Azores Azores	9,000,000
199G	Nav Sta Argentina Argentina	2,500,000
365	West Coast Offshore Offshore WC	189,000,000

10. With respect to the offshore portion of the IFB, the IFB provided in part as follows:

> IE9 BALANCE OF PAYMENTS RESTRICTIONS
>
> (DFSC May 1968)
>
> (a) The following items being purchased hereunder are in implementation of the Balance of Payments Program. Only products which have been refined in the United States will be considered under this solicitation for such items.
>
> * * * * *
>
> (c) Balance of Payments Restrictions are applicable to items: 197, 198, 199A, 199B, 199C, 199D, 199E, 199F, 199G and 365.

The effect of this provision was to bar suppliers from fur-

nishing foreign-refined fuel to the offshore points covered by the IFB.[14]

11. The IFB also provided in part as follows:

IE1 IMPORT QUOTA (DFSC 68 SEP)

The Department of Defense does not presently intend to utilize any of its "finished products" import quota for purchases under this solicitation.

In effect, this provision meant that no offer of foreign-refined fuel (that is, fuel refined outside the 50 States or the District of Columbia from foreign crude oil) would be considered for award if acceptance of the offer required use of the Department of Defense's import quota for finished petroleum products (see finding 5, *supra*). While a bidder who intended, if successful in bidding, to supply any of those domestic needs (that is, those IFB items not subject to balance of payments restrictions) in the IFB with foreign-refined JP-4 jet fuel might, theoretically, utilize its own import quota (if it had one) to do so, this was not an economically realistic alternative because a bidder with such an import quota would have other more valuable sales opportunities elsewhere. Plaintiff had no such import quota in any event.

12. Upon consideration of the IFB, with its balance of payments restrictions and import quota clauses, plaintiff reasonably concluded that the IFB involved competition only among domestic suppliers, with each bidder offering only domestically refined JP-4 jet fuel.[15] Plaintiff's judgment was that contract awards pursuant to the IFB would place an additional demand on domestic refineries without any corresponding significant increase in domestic

[14]Its inclusion in the IFB resulted from a requirement placed on DFSC to purchase domestically refined products in order to aid the government's balance of payments situation.

[15]At trial, defendant's supervisory procurement agent (contracting officer) on this "domestic" procurement expressed that same view.

supply capability,[16] and that, as a matter of sound business practice, its bid should accordingly reflect that increased demand upon domestic refineries. *Cf.* finding 3(b), *supra*. Plaintiff's objective (parenthetically, one shared by most bidders) was to bid as high as it could and still obtain a contract with defendant. When compared to other bidders who successfully responded to the IFB, plaintiff's bid prices were in some instances very close to the "cutoff point" (*i.e.*, the highest price defendant had to agree to pay for the jet fuel it ordered), while in others plaintiff's bid prices were "in the middle and on the high end."

13. (a) The estimated offshore JP-4 jet fuel needs covered by the IFB (371,960,000 gallons) represented only a fractional part of the government's total projected overseas needs for JP-4 jet fuel during the period July 1 to December 31, 1969. Accordingly, in February and March, 1969, five other solicitations for bids calling for delivery, during that same period, of vast amounts of JP-4 jet fuel to defendant for overseas needs were issued. Those five solicitations ("the offshore IFBs") invited offers for delivery of such fuel to ports in Viet Nam and Thailand; for delivery of such fuel either into government-furnished vessels at contractor facilities in the Caribbean Sea, Arabian Gulf, and Pacific area, or, via contractor vessels, into government-furnished storage in the Philippines, Okinawa, Japan, Korea, Taiwan, and Thailand; and for delivery of JP-4 jet fuel (for Turkey, Italy, Libya, the United Kingdom, and Germany) to government-furnished vessels in the Mediterranean area or into government-furnished storage. As a result of the offshore IFBs, contracts covering 1,396,304,000 gallons of JP-4 jet fuel were awarded to some 31 foreign suppliers.

(b) The offshore IFBs were not subject to any balance of

[16]Defendant's supervisory procurement agent also testified that from the IFB any businessman would conclude that competition from domestic refiners would be substantially reduced.

payments restrictions, and fuel supplied to defendant pursuant to them was not limited to "U.S.-refined only" fuel.[17]

(c) Most, if not all, of the overseas points of use (or points of delivery) specified in the offshore IFBs differed from those overseas delivery points specified in the IFB, and if the IFB and the offshore IFBs overlapped, in terms of actual points of use (or points of delivery), that overlap could only have related to Item 365 of the IFB (covering JP-4 jet fuel to be used "at various Pacific bases"); the offshore IFBs contemplated, *inter alia*, fuel for use in (or delivery to) Viet Nam, Thailand, the Philippines, Okinawa, Japan, Korea, and Taiwan.

14. (a) Plaintiff responded to the IFB on March 14, 1969. On March 18, 1969, there was a public bid opening, at which representatives of plaintiff were in attendance. On May 28, 1969, plaintiff was awarded contract No. DSA 600-69-D-2007 to supply an estimated 182,516,000 gallons of JP-4 jet fuel for a total contract amount of $19,017,842.40. Of that total gallonage, 31,316,000 gallons were for delivery at destination (by pipeline or tank truck) to four naval air stations, each located in Texas, and the remainder (151,200,000 gallons) was for origin delivery to the Air Force aboard tanker at plaintiff's Corpus Christi, Texas, plant.[18]

[17]At the time here relevant, foreign refiners could and did underbid domestic refiners subject to balance of payments restrictions, because the price of foreign fuel plus the cost of transporting it to foreign destination was lower than the price of "U.S.-refined fuel" plus the cost of transporting it to foreign destination.

[18]Plaintiff did not know prior to loading precisely where the JP-4 jet fuel for origin delivery might ultimately be transported. *Cf.* finding 14(b), n. 19, *infra*. It appears, however, that the intended destination of 50,238,900 gallons of such fuel was Hawaii. See finding 14(c), n. 20, *infra*

(b) Plaintiff's contract specified that the "off-shore" gallonage (151,200,000 gallons) awarded plaintiff for tanker delivery at origin was for the account of the Air Force, and broke that gallonage down as follows:

Item No.[19]	Quantity (gallons)
1AA	33,600,000
1AB	33,600,000
1AC	33,600,000
1AD	25,200,000
1AE	25,200,000

(c) A portion of that "offshore" gallonage (100,961,100 gallons) was specifically made subject by the contract to balance of payments restrictions,[20] as follows:

> The following items being purchased hereunder are in implementation of the Balance of Payments Program. With regard to those items, the Contractor shall deliver only product which has been refined in the United States.

[19]Each Item No. represented a particular destination (or area) for the quantity of fuel shown. When a contract is awarded on an origin basis for tanker delivery, each gallon of product has been evaluated by defendant and is normally destined for a particular terminal; as to any amounts for Item 365, the gallonage must have been destined for a particular area. In practice, however, diversions frequently occur. *Cf.* finding 8(c), *supra*.

[20]Accordingly, 50,238,900 gallons thereof (Item 1AC and part of Item 1AA) were not subject to such restrictions. Under the IFB's terms, the only offshore fuel not subject to such restrictions was the amount (119,587,500 gallons) projected for storage by the Air Force in Hawaii. While foreign-refined fuel thus could have been supplied to meet that projection, a domestic supplier would have to use its own import quota in order to bring foreign-refined fuel into Hawaii, and that was not an economically realistic alternative; plaintiff, in any event, had no import quota.

Item No.	Quantity (gallons)
1AA	16,961,100
1AB	33,600,000
1AD	25,200,000
1AE	25,200,000

15. (a) Plaintiff's contract contained a "Scope of Contract (DFSC 1968 JUN)" clause[21] in pertinent part as follows:

> IVB1a * * *
>
> (a) The Contractor shall furnish and deliver * * * the supplies and perform the services set forth in the Contract Schedule, for the prices payable according to the terms thereof, in such quantities as may be ordered by the Ordering Officer during the period specified in the Schedule; in consideration therefor, the Government shall order, accept and pay for, on the terms and subject to the conditions set forth herein, supplies or services having an aggregate value at the prices payable under this contract of not less than $100.00: PROVIDED, however, that the Government shall be entitled to order, and the Contractor shall be required to furnish if ordered, supplies or services equivalent to but not in excess of the quantity designated by the Schedule for each item * * *.

Clause IVB1a further provided that, "on the final order placed under any item of the Schedule calling for delivery into or by means of tanker, barge or pipeline, the Government shall be entitled to order, and the Contractor shall be

[21] DFSC had used the same or a similar clause, without any objection by contractors, since at least 1955. It is essentially directed to a situation in which there is a diminution or reduction in governmental need for fuel, and was so understood by both parties here.

required to furnish if ordered, (i) double the undelivered quantity under such item of the contract at the time such final order is placed, or (ii) such undelivered quantity plus 30,000 barrels, whichever is lesser * * *."

(b) Plaintiff's contract thus committed it to supply to defendant an estimated 30,000,000 gallons of JP-4 jet fuel per month, if ordered,[22] over the 6-month period July 1-December 31, 1969, plus any additional amounts ordered by defendant under clause IVB1a's "final order" option terms. Minimum (and maximum) limitations on each single delivery were contractually specified, however; unless plaintiff otherwise agreed, each pipeline delivery out of Corpus Christi was subject to a 40,000 barrel maximum and a 20,000 barrel minimum, and each tanker delivery at Corpus Christi was subject to a 200,000 barrel maximum quantity, and a 20,000 barrel minimum quantity, per order.

(c) By contract modification P001, effective July 2, 1969, a quantity of 14,000,000 gallons of JP-4 jet fuel was transferred from Item 1AE to a new Item 6AA for destination delivery, via pipeline, to a pipeline terminal in Austin, Texas, at a price of $.1104 per gallon, rather than a price of $.103010 per gallon for origin delivery to the Air Force at plaintiff's Corpus Christi plant, as Item 1AE had called for. The modification resulted from defendant's acceptance of plaintiff's offer to reduce Item 1AE, and add a new item, with a new place and method of delivery, and at a different price.

(d) By contract modification P003, effective October 14, 1969, Item 2AA and Item 4AA, for destination delivery by pipeline/tanker truck to the Navy in Texas, were decreased by 5,000,000 gallons and 3,000,000 gallons, respectively, to new totals of 15,400,000 and 5,216,000 gallons of JP-4 jet

[22] The contract contained a Termination for Convenience clause, but also expressly provided that that clause "shall apply only to *orders* placed under this contract." (Emphasis added.)

fuel respectively, and a new Item 7AA was established for destination delivery via pipeline to a pipeline terminal in Austin, Texas, of 5,300,000 gallons of such fuel at a price of $.1066 per gallon (nearly one cent per gallon less than the price per gallon specified in plaintiff's contract price, as a result of this contract modification, was $359,220.

16. (a) Speaking very generally, it was within the contemplation of both parties, at the time of contract award to plaintiff, that JP-4 jet fuel ordered by defendant under that contract would be used wherever defendant needed it. *Cf.* finding 14(b), n. 19, *supra.* While the IFB had listed more than 300 specific military destinations throughout the world (plus, of course, Item 365, covering "various Pacific bases"), and had set forth an estimate of the gallonage which defendant needed to have under contract for the period July 1 to December 31, 1969, for each such destination (or, in the case of Item 365, area),[23] both defendant and plaintiff were clearly aware of the probability, if not the inevitability, of diversions or reroutings of JP-4 jet fuel from one destination to another, for any one of a number of valid reasons.

(b) The record is less than clear as to actual deliveries of the JP-4 jet fuel ordered from plaintiff (and other contractors, domestic and foreign) to various military destinations during the period July 1 to December 31, 1969, but it does reflect that some of the said fuel ordered from plaintiff under Item 1 of the contract in suit, for origin delivery to the Air Force for overseas use, was discharged at various locations in the United States (including Alaska, Florida, Georgia, and South Carolina), and that some of such fuel was also discharged at various locations (Thailand, Viet Nam, and Okinawa) offshore.

[23]Plaintiff's contract, in and of itself, did not cover *all* the July 1 - December 31, 1969 needs of any particular destination listed in the IFB.

17. On July 28, 1969, DFSC was notified that worldwide Air Force usage of JP-4 jet fuel for the 6-month period ending December 31, 1969, would be substantially lower than had originally been anticipated, largely as a result of the sharp reduction in combat activities in Viet Nam. On July 30, 1969, DFSC in turn notified plaintiff, and other United States contractors with DFSC, by telegram, that "due to declining world-wide requirements there will be some reduction in JP-4 and JP-5 liftings for the period ending 31 December 1969." DFSC further stated that every effort was being made to determine the impact of the decline in such requirements on specific contracts, and that plaintiff would be further advised as soon as that information was available.

18. By letter dated August 29, 1969, the Chief, Domestic Fuels Division, DFSC, advised plaintiff, in pertinent part, as follows:

> * * * The demand for JP-4 to be supplied under your Contract number DSA 600-69-D-2007 to the Air Force will be reduced from 182,516,000 gallons to 78,728,950 gallons. The Department of the Air Force is being instructed not to place orders in excess of the revised quantity through 31 December 1969 without prior approval of this Center. * * *

Over the remaining term of plaintiff's contract, the actual reduction from the estimated requirements of JP-4 jet fuel amounted to 105,666,968 gallons (some 57 percent less than the initial contract amount).[24]

[24]The notice of reduced liftings notified plaintiff of a reduction of items set out in plaintiff's contract as subject to the balance of payments restrictions clause in the amount of 60,223,531 gallons; of a reduction of items of offshore quantities not subject to that clause of 33,600,000 gallons; and a reduction by 9,963,519 gallons of a quantity of 14,000,000 gallons intended (under a supplementary agreement effective July 2, 1969) for destination delivery by pipeline to a pipeline terminal in Austin, Texas. See finding 15(c), *supra.*

19. (a) DFSC's decision, as set forth in finding 18, *supra*, was reached in the following manner. Upon establishing that the maximum quantities of JP-4 jet fuel under contract for the period ending December 31, 1969, were approximately 399,000,000 gallons in excess of the reduced needs of the Department of Defense, DFSC weighed the alternative courses of action. A decision to reduce orders under *all* existing contracts, on the most economical basis, was ultimately approved by the Deputy Assistant Secretary of Defense (Supply and Services). Since the reduced usage of JP-4 jet fuel had suddenly eased defendant's earlier near-capacity demands upon the combined productive capacity of all available refiners, DFSC made its reduction evaluation on the basis of returning to historical and more economic patterns of worldwide supply. *Thus, U.S. Gulf Coast fuel would again cease to be used so extensively in the Pacific, and Caribbean fuel would again be used to meet anticipated needs in Europe and the continental United States.*[25]

(b) In practical effect, DFSC exempted six small businesses from the reduction evaluation and then cut back orders under the highest priced contracts for JP-4 jet fuel for the period ending December 31, 1969 first, thereby in substance repeating the evaluation process by which the contracts were originally awarded, but using the revised anticipated needs for each depot or activity. In that evaluation process, however, domestic and foreign producers were, in effect, competing, although on the basis of separate prices originally bid under separate procurements, for the remainder of the JP-4 jet fuel to be ordered after the cutback. The

[25]This and other findings, based upon stipulations of the parties, can fairly be read to mean only that during the period here material some foreign-refined JP-4 jet fuel under contract to defendant was delivered to the Pacific and to Europe, and, through use of DOD's import quota, to the United States, in lieu of domestically refined JP-4 jet fuel also under contract to defendant. See also finding 3(b), n. 4, *supra;* finding 19(c), *infra*.

record does not reflect the actual diminution in need at each using activity throughout the world. The parties have, however, stipulated that because of the mechanics by which the cutback was implemented, plaintiff experienced a share of the overall cutback greater than any actual diminution in need that may have occurred at the locations or points of use indicated for the bid items that were awarded to plaintiff. So far as the record reflects, the situation of reduced usage resulting in some 400,000,000 gallons of JP-4 jet fuel in excess of needs under contract with which DFSC was faced in the second half of 1969 was a unique one, and so was the method chosen by defendant for rectifying that situation.

(c) The cutback was carried out on a worldwide basis. Fuel needs that remained open under all existing JP-4 jet fuel contracts for the period ending December 31, 1969, were competitively evaluated and were reallocated among defendant's existing suppliers on the basis of the prices they had initially offered. Thus, even though those existing contracts ("domestic" and offshore) had originally been let on the basis of separate prices bid under separate procurements, the reduction in fuel demand, the indirect result of a fall-off in military jet fuel usage worldwide, but especially in Southeast Asia, became the occasion for a competitive reevaluation and rerouting of remaining worldwide needs on the basis of price alone.[26]

[26]In actuality, this was a return to the channels of distribution that had existed prior to peak Viet Nam fuel demands, and it entailed both some use of DOD's import quota and a reduction in the applicable Balance of Payments Program. An import quota, or "ticket", had a commercial value of three to four cents per gallon, or $1.26 to $1.68 per barrel, because foreign product was then much cheaper than domestic product. In using its import quota, DOD did not give any consideration to "ticket" value, but computed its cost on product price plus freight charges.

(d) In thus effecting the cutback, defendant accorded plaintiff no economic concessions because it had bid on the basis of delivering (and was contractually obligated to deliver in accordance with balance of payments restrictions and foreign product import restrictions), domestically refined fuel which was, by definition, higher priced than foreign-refined fuel.[27]

20. Following the evaluation process just described, anticipated reductions in orderings of JP-4 jet fuel under all existing contracts for the period ending December 31, 1969, were made and formally announced to plaintiff, and to the 14 other affected companies, by letters from DFSC dated August 29, 1969. See finding 18, *supra*. Each of the companies affected by the cutback was a United States company, and each was a bidder who had been awarded a contract under the IFB. The total reduction in orderings announced amounted to 396,744,612 gallons. Plaintiff's share of that reduction represented 26 percent of the total cutback effected, and 57 percent of the amount in plaintiff's contract. Although three other companies affected by the cutback received a greater percentage underlift than did plaintiff, plaintiff's underlift in gallons was far more than that of any other such company. The cutback did not reach some 56 United States suppliers[28] who had also been awarded contracts pursuant to the IFB, nor did it reach any of the foreign suppliers awarded contracts pursuant to the offshore IFBs described in finding 13, *supra*. *Cf.* finding 12, *supra*.

21. (a) Given the facts that, at the time here material, domestically refined fuels were higher priced than foreign-refined fuels, the terms of the IFB, a diminution in defen-

[27]Nor did defendant accord any such concessions to the other successful bidders under the IFB whose situations were, in these respects, at least, similar to plaintiff's.

[28]Six of these were, however, small businesses exempted from the reduction evaluation.

dant's needs for JP-4 jet fuel under contract of a magnitude of some 399,000,000 gallons, a governmental decision to reduce orders under all existing contracts for the period ending December 31, 1969 on the most economical basis, a use of DOD's import quota, and a reduction in the applicable Balance of Payments Program, without any concessions to plaintiff or other domestic suppliers in consequence of the balance of payment restrictions and import quota clauses in the IFB, the inevitable result of the process of reevaluation was that the reduction would impact upon domestic, rather than foreign, suppliers, and, at least in general terms, that the reduction would impact within the former group upon the highest successful bidders pursuant to the IFB.

(b) While the record does not reflect that during the period here material defendant awarded any new contracts for JP-4 jet fuel to foreign refiners, nor justify a finding that, after the cutback, any foreign supplier delivered JP-4 jet fuel to any of the using activities covered by plaintiff's contract in excess of the amounts that foreign supplier was contractually obligated to deliver to defendant before the cutback, it is fair to conclude therefrom that in the circumstances described above the consequences of an excess of JP-4 jet fuel under contract to defendant fell, and could only have fallen, entirely upon domestic suppliers.

22. On July 23, 1970, plaintiff applied to DFSC for a contract adjustment, in the form of an amendment without consideration, pursuant to Public Law 85-804. Plaintiff's said request was signed both by plaintiff's president and by members of the then law firm of Hudson and Creyke, its attorneys. In the said request, plaintiff stated, *inter alia*, that contract No. DSA 600-69-D-2007 "is the type referred to as an indefinite quantity contract * * *", and that defendant's action in making the cutback described hereinabove "while within its literal rights under this unusual type of contract

was a radical departure from prior practice and has had a severe effect upon [plaintiff]."

23. This action was filed May 12, 1972.

CONCLUSION OF LAW

Upon the trial judge's findings and opinion, which are adopted by the court, the court concludes as a matter of law that plaintiff is entitled to recover and judgment is entered to that effect. Absent a stipulation of the parties as to the amount of recovery due plaintiff, that amount is to be determined in further proceedings pursuant to Rule 131(c).